(15)

No. 89-258-CFX
Status: GRANTED

Title: California, Petitioner
v.
American Stores Company, et al.

Docketed:
August 10, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Horn Jr.,H. Chester

Counsel for respondent: Rothman,Frank, Lee,Rex E.

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1989	G	Petition for writ of certiorari filed.
2	Aug 18 1989	G	Application (A89-151) for a stay of mandate pending disposition of petition for writ of certiorari, submitted to Justice O'Connor.
3	Aug 19 1989		Response to application (A89-151) filed by American Stores Co., et al..
5	Aug 21 1989		(A89-151) Application to modify stay filed by Respondents.
6	Aug 22 1989		(A89-151) Response to application to modify stay filed by Petitioner.
7	Aug 22 1989		(A89-151) Amended order entered by Justice O'Connor; conditioning the order upon the posting of a bond with the lower court.
8	Aug 22 1989		(A89-151) In-Chambers opinion issued by Justice O'Connor.
4	Aug 24 1989		Application (A89-151) granted by Justice O'Connor.
9	Sep 11 1989		Brief amici curiae of 29 States filed.
11	Sep 12 1989		Order extending time to file brief of respondent on the merits until October 13, 1989.
12	Sep 12 1989		The above extension of time applies to all respondents.
13	Sep 13 1989	D	Application (A89-216) of respondents for an order resubmitting the bond question to the United States District Court, submitted to Justice O'Connor.
16	Sep 13 1989		(A89-216) Application of respondents to file documents under seal.
15	Sep 15 1989		Response to application (A89-216) from petitioner requested by Justice O'Connor, due September 21, 1989.
17	Sep 15 1989		(A89-216) Application to file documents under seal granted by Justice O'Connor, pending further order of the Court.
22	Sep 15 1989	X	Brief amicus curiae of Center for Public Law filed.
14	Sep 20 1989		Brief of respondents American Stores Co., et al. in opposition filed.
18	Sep 21 1989		Response to application (A89-216) filed by petitioner.
19	Sep 22 1989		(A89-216) Respondents' reply to petitioner's response in opposition.
20	Sep 25 1989		Application (A89-216) denied by Justice O'Connor.
21	Sep 27 1989		DISTRIBUTED. October 13, 1989
23	Oct 5 1989	X	Reply brief of petitioner California filed.
24	Oct 16 1989		Petition GRANTED.
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25	Nov 16 1989		Brief of petitioner California filed.

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No. 89-258-CFX

Entry	Date	Note	Proceedings and Orders
26	Nov 27 1989		SET FOR ARGUMENT TUESDAY, JANUARY 16, 1990. (2ND CASE)
27	Nov 29 1989		Brief amicus curiae of 32 States filed.
28	Nov 30 1989		Brief amicus curiae of Center for Public Interest Law filed.
29	Dec 1 1989		Joint appendix filed.
30	Dec 1 1989		Brief amici curiae of California Retailers Assn., et al. filed.
31	Dec 1 1989		Brief amicus curiae of Business Roundtable filed.
32	Dec 1 1989		Brief of respondents American Stores Co., et al. filed.
33	Dec 1 1989		Brief amici curiae of United Food and Commercial Workers Internatl. Union, et al. filed.
34	Dec 8 1989		CIRCULATED.
35	Dec 21 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 boxes, received. (Sealed Env. Gullickson looking at pics).
36	Dec 30 1989	X	Reply brief of petitioner California filed.
37	Jan 5 1990		Letter from respondent including stipulation and Court Order from Central District of California received and distributed.
38	Jan 16 1990		ARGUED.

89-258

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Ninth Circuit's decision presents the following fundamental questions concerning the availability of injunctive relief under section 16 of the Clayton Act to remedy mergers violating section 7 of the Clayton Act:

1. Whether divestiture is a form of "injunctive relief" under section 16 of the Clayton Act.

2. Whether the Court of Appeals erred by reversing a District Court's preliminary injunction preserving the possibility of divestiture, which the District Court found essential to effective relief, on the ground that such divestiture was not authorized by section 16 of the Clayton Act to remedy violations of section 7 of the act.

The Ninth Circuit's decision was based on its prior decision in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) (*IT&T*), holding that the legislative history of section 16 barred the remedy of divestiture to antitrust plaintiffs. The decision below and *IT&T* both conflict directly with the First Circuit's decision in *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc.*,754 F.2d 404 (1st Cir. 1985), holding that neither the legislative history of section 16 nor any justifiable policy of antitrust enforcement supported such an unwarranted invasion of the equitable powers of District Courts.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the petitioner, the State of California, and the respondents American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc.

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No.

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THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

VS.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner State of California ("California") respectfully prays that a writ of certiorari issue to review the March 31, 1989, judgment and opinion of the United States Court of Appeals for the Ninth Circuit, reversing the granting of a preliminary injunction that halted the merger of Lucky Stores, Inc. ("Lucky"), the largest supermarket chain in California, with American Stores, Inc. ("American"), owner of the fourth largest. The Ninth Circuit's opinion held that, despite finding "overwhelming statistical evidence . . . that the merger will substantially lessen competition in violation of Section 7 of the Clayton Act," causing consumers to be "substantially

and irreparably harmed," the District Court was powerless to enjoin the merger. The court's decision was based solely on the fact that American had acquired Lucky stock during Federal Trade Commission (FTC) review, even though the firms were ordered by the FTC to hold their operations separate.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 872 F.2d 837, and is reprinted in Appendix A hereto, *infra*. The memorandum and order of the United States District Court for the Central District of California (Kenyon, D.J.) is reported at 697 F. Supp. 1125, and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The Ninth Circuit entered its judgment on March 31, 1989. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 3, 1989. (Appendix C, *infra*.) This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. section 18 (1982):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of any other corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 16 of the Clayton Act, 15 U.S.C. section 26 (1982):

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

STATEMENT OF THE CASE

On March 21, 1988, American initiated a hostile takeover bid for the Lucky supermarket chain with the intent of merging Lucky's operations in California with those of American's Alpha Beta Stores, Inc. ("Alpha Beta"), bringing under one management 592 California supermarkets.[1] (872 F.2d at p. 839.) Pursuant to the Hart-Scott-

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[1]When American Stores launched its tender-offer, Lucky was the largest supermarket chain in California, while Alpha Beta was the fourth largest. (872 F.2d at 839.) The proposed Alpha Beta-Lucky merger was announced while another major acquisition, Von's purchase of the 172 supermarkets comprising Safeway's Southern California Division, was also pending before the FTC. (See 697 F.Supp. at p. 1127; ER 616.) The following table illustrates the size of the four firms whose acquisition activities were necessarily considered by the District Court (ER 616):

	California			United States		
Supermarket of Chain	Rank	Annual $ Sales (billions)	No. of Stores	Rank	Annual $ Sales (billions)	No. of Stores
Lucky	1	4.13	340	6	7.0	481
Safeway	2	3.73	327	2	17.0	1500
Vons	3	3.13	197	10	3.17	190
American Stores (Alpha Beta)	4	2.44	252	3	14.3	1590

Rodino Antitrust Improvements Act (H-S-R) (15 U.S.C. § 18a), American Stores gave notice of its intentions to the FTC. (872 F.2d, at pp. 839-40.)

California immediately began to review the Lucky acquisition. In mid-April, American Stores delivered some 72 boxes of documents and hundreds of pages of interrogatory responses comprising its H-S-R filing with the FTC to petitioner. (ER 594.) Petitioner retained three economists with national reputations as experts in retail food distribution to advise it concerning the competitive implications of American Stores' acquisition of Lucky (ER 30, 142, 153, 175, 600 and 990).

On May 23, American Stores increased its tender offer, and Lucky's board approved a merger of the two firms. (872 F.2d at p. 840.) The FTC concluded that the merger, as proposed, would violate section 7 of the Clayton Act (15 U.S.C. § 18) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). On May 31, 1988 — eight days after Lucky agreed to the merger and six weeks after California received the H-S-R materials — the FTC issued an administrative complaint alleging substantial injuries to competition in the retail sale and distribution of food and grocery items in supermarkets throughout California. (ER 598Y-CC.)

Simultaneous with publication of the complaint, the FTC released a proposed consent order its staff had negotiated with American, proposing settlement of its complaint in exchange for American's agreement to certain conditions. (872 F.2d at p. 840.) The FTC solicited

public comment on the proposed consent agreement pursuant to its regulations governing consent agreement procedures. (16 C.F.R § 3.25 (f).) The FTC also entered into a Hold Separate Agreement with American requiring it to hold the operations of Lucky separate from those of Alpha Beta until the completion of the Commission's review of the proposed consent order, including review of the public comments required under the Commission's regulations. (697 F.Supp. at pp. 1133-34.)

Throughout this period petitioner repeatedly warned American that failure of the FTC to remedy California's concerns could result in this action. (697 F.Supp. at p. 1135.) American ignored these warnings and on June 1, 1988 — just two days after the FTC opened its comment period — commenced its purchase of the Lucky shares. (697 F.Supp. at p. 1135.) By June 2, American had acquired more than 94% of Lucky's outstanding shares. (ER 596.) On June 9, American Stores completed its acquisition of the Lucky stock by accomplishing a short-form merger under Delaware law. (*Ibid.*)

On July 22, 1988, petitioner filed timely comments with the FTC analyzing the substantial harm the Lucky acquisition threatened to California consumers and recommending withdrawal of the FTC's proposed consent agreement. (697 F.Supp. at p. 1135.) On August 31, 1988, the FTC gave final approval to the proposed consent order without modification to address any of the concerns expressed by petitioner. (697 F.Supp. at p. 1135.)

Having concluded that the merger presented a serious threat to California consumers, petitioner filed this suit on September 1, 1988, the day after the FTC's final action (*ibid.*), invoking jurisdiction under 28 U.S.C. section 1331 and 15 U.S.C. section 26. The preliminary injunction was

granted on September 29, 1988 (697 F.Supp. 1125), requiring American to:

1. Take all steps necessary to operate American, Alpha Beta, and their respective subsidiaries, divisions and groups independently of the assets and businesses of Lucky in the State of California.

2. Refrain from taking any action to modify the September 6, 1988, status quo as to the California operations of Alpha Beta or Lucky other than in the ordinary course of business, and to refrain from taking any further steps to merge or integrate the assets and businesses of American's Alpha Beta California operations and those of Lucky's California operations.

Two of the District Court's findings supporting this order require emphasis:

(1) The District Court found that the statistical evidence presented by petitioner concerning the probable effects of this merger, even assuming compliance with the conditions imposed by the FTC's consent order, "overwhelmingly create[d] the presumption that the increased concentration in the relevant markets which would result from the merger between Lucky and Alpha Beta supermarket chains would substantially lessen competition in those markets, and present[ed] a prima facie violation of Section 7 of the Clayton Act." (697 F.Supp at p. 1131.)

(2) The District Court found that "unless the defendants are enjoined [from completing the merger of Lucky and Alpha Beta], the citizens of California will be substantially and irreparably harmed." (697 F.Supp. at p. 1135.)

In arriving at these conclusions, the District Court rejected respondents' argument that this merger was "completed" when the Lucky stock purchase was accomplished and found that the effect of the FTC's Hold Separate Agreement was to insure that Lucky and Alpha Beta "retain[ed] their separate names and with them their respective corporate identities." (697 F.Supp. at p. 1134.) But the District Court found that absent an injunction, American Stores could "restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent." (*Ibid.*) The District Court concluded that the preliminary injunction was necessary "to remedy effectively the unlawful merger." (*Ibid.*)

On appeal, the Ninth Circuit affirmed the District Court's findings concerning the likelihood that California would prevail on its claim that this merger violates section 7 of the Clayton Act. (872 F.2d at pp. 840-44.) The Court of Appeals did not disagree that California had sustained its burden of proving the need for preliminary injunctive relief. (872 F.2d at p. 844.) However, the Court of Appeals held that the preliminary injunction ordered by the District Court was "overly broad" and an abuse of discretion because it ordered "American Stores to operate its subsidiaries [Alpha Beta and Lucky] separately . . . ." (872 F.2d at pp. 845-46.)

The Court of Appeals reasoned that the preliminary injunction was designed either to preserve the possibility of divestiture or to require the permanent separation of the Lucky and Alpha Beta operations in California. (872 F.2d at pp. 844-46.) As to permanent divestiture, the court applied its earlier holding in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) (*IT&T*) that divestiture was not a remedy available under section 16 of the Clayton Act, to conclude that California was not entitled to divestiture here. (872 F.2d at p. 845.) As to

permanent separation of the two companies, the court reasoned that the order exceeded the District Court's jurisdiction, since the "preliminary injunction . . . prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors." (*Ibid.*) From this, the court concluded that the preliminary injunction is defective because it required "indirect divestiture," also prohibited by *IT&T*. (*Ibid.*) Because it found that the preliminary injunction was designed to preserve relief not available to California under its previous interpretations of section 16 of the Clayton Act, the court struck it down as "overly broad." (872 F.2d at pp. 845-46.)

The Court of Appeals agreed that, although not entitled to divestiture, petitioner had demonstrated the need for injunctive relief. (872 F.2d at pp. 844, 846.) In remanding to the District Court, the Court of Appeals held that the lower court was limited to "relief 'directed at the symptoms rather than the underlying cause'" of the injury threatened by American Stores' unlawful acquisition. (872 F.2d at p. 846.)

REASONS FOR GRANTING THE WRIT

The First and Ninth Circuits have reached opposite conclusions on the important question whether section 16 of the Clayton Act authorizes district courts to order divestiture to remedy mergers which violate section 7 of the Clayton Act. California respectfully urges this Court to resolve that conflict by granting certiorari and reversing the decision of the Ninth Circuit. This divergence has led to a split of authority in the Second and Third Circuits, which disagree with the Ninth, and courts in the Sixth, Seventh, and Tenth, which follow the Ninth.

The Court should review the "no-divestiture" rule because its absolute bar to an effective remedy against illegal mergers is unwarranted by the language of section 16, its legislative history, or any of the policies underlying the antitrust laws and equitable principles. The Ninth Circuit's corollary rule prohibiting "indirect divestiture," places additional, unwarranted restraints on the ability of district courts to deal effectively with mergers violating section 7.

The Ninth Circuit's decision, unless overturned by this Court, will preclude the District Court from considering the remedy which has long been recognized as the surest weapon against unlawful mergers. As a practical matter, such a result will prevent California from securing relief preventing the very harm section 7 of the Clayton Act was designed to prevent — the aggregation of undue market power. Instead, the Ninth Circuit's rule condemns California consumers and the District Court on remand to the uncertain prospect of "symptomatic" injunctive remedies which, at best, will take years to mitigate the proven injury threatened by American Stores' unlawful acquisition of Lucky.

I.

A DECISION FROM THIS COURT IS ESSENTIAL TO RESOLVE A RECURRING CONFLICT AMONG THE CIRCUIT AND DISTRICT COURTS ON THE AVAILABILITY OF DIVESTITURE UNDER SECTION 16 OF THE CLAYTON ACT AND TO RESTORE UNIFORM ENFORCEMENT OF THE NATION'S ANTITRUST LAWS

IT&T and the decision below conflict directly with the decision of the First Circuit Court of Appeals in *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc.*, 754 F.2d

404 (1st Cir. 1985) holding that divestiture is a form of injunctive relief available to plaintiffs under section 16 of the Clayton Act. The same opinion was expressed by the Third Circuit in dictum. (*NBO Industries Treadway Cos., Inc.* v. *Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975).) A number of district courts have reached the same conclusion. (See *Consolidated Gold Fields, PLC.* v. *Anglo American Corp.*, 1989 Trade Cases ¶ 68,536 (S.D.N.Y. 1989) (hold separate order and divestiture available); *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F.Supp. 1250, 1255-56 (E.D.Pa. 1987) (divestiture available); *Joseph Ciccone & Sons* v. *Eastern Ind.*, 537 F.Supp. 623, 630 (E.D.Pa. 1982); *Nasso Concrete Corp.* v. *DIC Concrete Corp.*, 467 F.Supp. 1016 (S.D.N.Y. 1979) (divestiture available); *Julius M. Ames Co.* v. *Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965) (divestiture available).) Other courts have followed the Ninth Circuit. (See *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.); *cert. denied,* 469 U.S. 1036, 105 S.Ct. 510, 83 L.Ed.2d 401 (1984) (divestiture not available); *Pretz* v. *Holstein Friesian Ass'n. of America*, 698 F.Supp. 1531, 1536-37 (D.Kan. 1988) (divestiture not available); *Mr. Frank, Inc.* v. *Waste Management, Inc.*, 591 F.Supp. 859, 865 (N.D.Ill. 1984) (divestiture not available).)

The commentators have noted this aberration in national antitrust policy and are virtually unanimous that the Ninth Circuit is wrong — that divestiture ought to be available to plaintiffs in section 16 cases. (Kintner, *Federal Antitrust Law,* V:40.32, n.963 (1984); P. Areeda, *Antitrust Analysis,* 57, n.139 (2d Ed. 1974); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act,* 49 Minn. L. Rev. 267 (1964); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act,* 48 Tex. L. Rev. 54 (1969); Note, *The Use of Divestiture in Private Antitrust Suits,* 43 Geo.

Wash. L. Rev. 261 (1974); and Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief,* 19 Pac. L. J. 143 (1987).)

Without action by this court, California must proceed to trial deprived of even the opportunity to seek the remedy this Court has repeatedly recognized " . . . should always be in the forefront of a court's mind when a violation of § 7 has been found," (*United States* v. *E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters* v. *United States*, 334 U.S. 110, 128 (1948),) while plaintiffs in the First, Second, Third and Fifth Circuits face no such handicap. This disparity results simply from the geographic location of the target firm, a fortuity which should play no role in our national antitrust enforcement scheme.

Because the decision below creates such grave risks to California consumers from an issue affecting enforcement of the nation's antitrust laws about which the circuit courts are in conflict, petitioner respectfully submits that resolution of that conflict deserves the attention of this Court now. (Rule 17.1 (a), Rules of the Supreme Court of the United States.)

II.

THE NINTH CIRCUIT'S NO-DIVESTITURE RULE CONFLICTS WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE CLAYTON ACT AND UNDERMINES THE COURTS' INHERENT EQUITABLE POWERS

A. Section 16 Contains No Limitation On Available Relief

Section 16 of the Clayton Act, 15 U.S.C. section 26, provides in part:

> "Any person . . . shall be entitled to . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . "

"[T]he statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order" (*CIA Petrolera Caribe* v. *ARCO Caribbean, Inc., supra,* 754 F.2d 404, 416) to remedy violations of section 7 of the Clayton Act.

An injunction mandating the divestiture of assets acquired in violation of section 7, is certainly within the plain meaning of "injunctive relief" in section 16. "Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (*Brown* v. *Swann,* 10 Pet. 497, 503 [9 L. Ed. 508].)

B. The Legislative History of Section 16 Does Not Justify the Ninth Circuit's No-Divestiture Rule

In *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc., supra,* the First Circuit held that divestiture is injunctive relief available under section 16 and reversed a district court's grant of summary judgment dismissing a section 7 action based on the supposed unavailability of the divestiture remedy sought by the plaintiff. (754 F.2d at pp. 406, 413-430.) The First Circuit thoroughly examined the historical underpinnings of *IT&T* and found no basis for the Ninth Circuit's conclusion that the legislative history of section 16 compels the conclusion that Congress did not intend to permit private parties to secure divestiture under section 16 of the Clayton Act. (*Ibid.*) To the contrary, the First Circuit points to substantial evidence within that history *supporting* the availability of divestiture. (754 F.2d at pp. 422-26.)

More importantly in light of this Court's requirement of "a clear and valid legislative command" restricting the equity powers of district courts (*Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 313, 102 S.Ct 1798, 1803, 72 L.Ed.2d 91 (1982)) the First Circuit concludes that:

> "Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one sure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. . . . The attempt to restrict "injunctive relief" to its putative meaning in 1914 collides head-on with this principle and must be rejected.

"Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. The explanations of record offered by committee and conference members were equally broad and general, stressing the purpose for which the section had been drafted. On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on § 16 'injunctive relief' which would negate the plain language or the sponsors' broad explanation of the provision. Accordingly, *we decline to engraft judicially a per se limitation on § 16 forbidding an order for divestiture.*" (754 F.2d at pp. 428-29 (emphasis added).)

C. The No-Divestiture Rule Fundamentally Conflicts With the Policies of the Clayton Act

1. The Ninth Circuit Reads Section 16 to Establish a Right Without The Most Effective Remedy

The Ninth Circuit's continuing enforcement of such an unwarranted judicial restriction on section 16 of the Clayton Act cannot be justified by any defensible policy of antitrust enforcement. As Areeda and Turner have noted:

"To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.

"Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.*" (2 P. Areeda & D. Turner, *Antitrust Law* § 328b (1978) (emphasis added).)

2. A Remedy That Depends on Aggrieved Parties Obtaining Judicial Relief Faster Than Investors Can Buy Stock is No Remedy at All

It is no answer to say that there is a private remedy under section 16 — that the plaintiff simply has to move faster than California did in this case.

The availability of effective relief from violations of section 7 cannot depend on plaintiffs winning that footrace. This Court knows well the size and complexity of section 7 cases. To secure an interlocutory injunction presumably requires a plaintiff to conduct the market studies and amass the other evidence necessary to show a prima facie violation of section 7. Merging firms intent on avoiding meaningful antitrust review can certainly purchase stock faster than persons outside the affected industry can make such a showing.

That fact is amply demonstrated by this case. The District Court found that California "conducted this investigation as swiftly as was responsibly possible." (697 F.Supp. at p. 1135.) The Circuit Court simply ignored this finding.

The Ninth Circuit's reading of section 16 encourages merging parties to structure their deals around an early exchange of stock to frustrate private enforcement of the Clayton Act. No plausible Congressional purpose is served by such a rule.

3. The Ninth Circuit Rule Compels Section 16 Plaintiffs to Disregard the FTC's Review Procedures

The import of the no-divestiture rule for victims of section 7 violations in the Ninth Circuit is that they participate in the "premerger" review procedures under the H-S-R at their peril.

The District Court found that California acted "responsibly" in conducting its investigation with the intent "to have the procedures contemplated by the Hart-Scott-Rodino Act run their course." (697 F.Supp. at p. 1135.) The Circuit Court, however, says "California could have sued several months earlier" (872 F.2d at p. 846) — nowhere acknowledging the necessary implication: that California should have disregarded the pending FTC review.

No sound policy is served by an interpretation of section 16 that requires aggrieved parties to initiate lawsuits in parallel with FTC proceedings.

4. The No-Divestiture Rule Ignores This Court's Teachings on the Broad Effect Section 16 is to be Given

Protecting consumers and the nation's economy from the threat posed by firms amassing undue market power is perhaps the paramount concern that the Congress was addressing in enacting the antitrust laws, particularly section 7 of the Clayton Act. (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States* v. *General Dynamics Corp.,* 415 U.S. 486, 496-97, 39 L.Ed.2d 530, 541-42, 94 S.Ct. 1186 (1974).) The Court has recognized the importance of the public interests at stake in section 7 cases by emphasizing strict

adherence to its oft stated command that equitable principles must yield effective results:

> "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. ***But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.*** *(United States* v. *Du Pont De Nemours & Co., supra,* 366 U.S. at p. 326 (emphasis added).)

This Court's historic insistence on preserving the full panoply of equitable powers available to district courts has found clear expression in decisions interpreting section 16 of the Clayton Act. In *Zenith Radio Corp.* v. *Hazeltine Research Inc.,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), the Court noted:

> "Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' . . . Its availability should be 'conditioned by the necessities of the public interest which the Congress has sought to protect.' " (395 U.S. at pp. 130-31.)

The decision below collides head-on with these principles by depriving petitioner of the remedy this Court has long recognized is the most effective method of dealing with unlawful mergers — divestiture. (*United States* v. *E.I. Du Pont De Nemours & Co., supra,* 366 U.S. at 330-331.) Because the Ninth Circuit's decision affects an

important question of federal law which remains unsettled after more than a quarter century, certiorari should be granted so that this Court can determine the availability of divestiture under section 16 of the Clayton Act. (Rule 17.1 (c), Rules of the United States Supreme Court.)

5. The Ninth Circuit's Rule Undermines Congressional Policy Favoring Private Enforcement of the Antitrust Laws

This Court has long recognized the important place Congress intended private enforcement to occupy under the antitrust laws. (E.g., *Zenith Radio Corp.* v. *Hazeltine,* 395 U.S. at pp. 130-31; *United States* v. *Borden Co.,* 347 U.S. 514, 518 (1954).) The Ninth Circuit's reading of section 16 simply ignores that principle — at a time when the principle has become even more important.

Since the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, was passed in 1978, merger activity has nearly tripled.[2] Dur-

[2]In 1979, 859 H-S-R premerger notifications were given to the federal enforcement agencies. (*Oversight And Authorization Hearings Into the Policies and Enforcement Record Of The Antitrust Division (DOJ) Before the Subcomm. on Monopolies and Commercial Law of the House Comm. of the Judiciary,* 100 Cong. 1st & 2d Sess. 355, 383, App. 1 (1989) (hereafter *"House Oversight Hearings"*). None was valued at more than one billion dollars. (D.W. Barnes, *Federal and State Philosophies in the Antitrust Law of Mergers,* 56 Geo. Wash. L. Rev. 263, 264 (1988) (hereafter, *"Federal and State Philosophies"*.) Of these, the Department of Justice initiated actions challenging 9, or approximately 1%. (*House Oversight Hearings* at p. 383.)

By 1986, the number of premerger notifications had risen to 1,949. (*House Oversight Hearings* at p. 383) Of these, 34 exceeded one billion dollars in value having a total value in excess of $68 billion. (Barnes, *Federal and State Philosophies* at p. 264.) The Department of Justice initiated actions challenging only 4, or .2%. (*House Oversight Hearings* at p. 383.) The FTC's enforcement efforts were no greater. (Barnes, *Federal and State Philosphies* at p. 264.)

ing the same time, the number of cases challenging mergers brought by the Federal antitrust enforcement agencies actually suffered a five-fold decrease. (*House Oversight Hearings* at 383; Barnes, *Federal and State Philosophies* at p. 265.) Between 1980 and 1986, the Antitrust Division's budget allocation declined by 30% in constant dollars, (*House Oversight Hearings* at p. 145), while the number of attorneys declined by 40%. *(Ibid.)* Thus, while the need for vigilant private enforcement of section 7 is increasing, the Ninth Circuit has eviscerated the ability of private parties to carry out the important role envisioned by Congress in enacting section 16.

III.

WITHOUT IMMEDIATE REVIEW BY THIS COURT CALIFORNIA'S RIGHT TO THE MOST EFFECTIVE ANTITRUST RELIEF WILL BE FORECLOSED

Divestiture is clearly the remedy of choice for section 7 violations. (*United States* v. *E.I. Du Pont De Nemours & Co.,* 366 U.S. *supra,* at p. 330-331 (1961); *Schine Chain Theaters* v. *United States,* 334 U.S. 110, 128 (1948).) The District Court below found that integration of the Alpha Beta and Lucky supermarket chains would "... disable the acquired chain from operating independently of the parent." (697 F.Supp. at p. 1134.) The Ninth Circuit affirmed the District Court's finding that as a result of this merger "citizens of California will be substantially and irreparably harmed." (697 F.Supp. at p. 1135, *aff'd,* 872 F.2d at p. 844.) Unless the Court reverses the Ninth Circuit's order now, California will be unable to secure

relief dismantling the unlawful combination of Alpha Beta and Lucky, if it prevails at trial.

California will be left with the prospect of pursuing unknown remedies aimed only at "the symptoms" (872 F.2d at p. 846) of the unlawful acquisition with no evidence that any such remedies will satisfy the Ninth Circuit's equally unwarranted stricture against "indirect divestiture" (872 F.2d at p. 845), or restore competition to the retail grocery market. California consumers face the proven prospect of losing several hundred million dollars annually in the form of higher prices (ER 1044) and the uncertainty associated with multiple treble-damage actions as the only means of recovering for that injury. (Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief,* 19 Pac. L.J. 143, 167-69.)

Experience with relief less than full divestiture of the acquired firm in the government's section 7 cases has proven how difficult it is to secure meaningful relief against unlawful mergers. (Rogowsky, *The Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull. 187 (1986); Elzinga, *The Antimerger Law: Pyrrhic Victories?,* 12 J. Law & Econ. 43 (1969); Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust,* 27 Indiana L.J. 1 (1951).) This Court's own experience bears out these difficulties. In *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 296 (D.Mass 1953), *aff'd. per curiam* 347 U.S. 521 (1954), the Court affirmed a district court decree directing relief short of the divestiture the government had requested. Ten years later, the district court again rejected the government's request for divestiture after the government concluded that the original decree had not restored competition to the market affected by the defendant's unlawful behavior. (*United States* v. *United Shoe Mach. Corp.*, 266 F.Supp 328 (D.Mass 1967).) This Court reversed and remanded to the District Court to reconsider the government's request for divestiture and directed it to enter a decree which would eliminate the effects of the defendant's monopoly forthwith. (*United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).)

In *United States* v. *E.I Du Pont De Nemours & Co., supra,* 366 U.S. 316, the Court reversed a district court decree for failure to order divestiture of stock acquired in violation of section 7 of the Clayton Act and took the unusual step of directing a divestiture decree. (366 U.S. at p. 334.) The public interest in effective relief is no less demanding simply because California, rather than the federal government, brought this case. (*Zenith Radio Corp.* v. *Hazeltine,* 395 U.S. at pp. 130-31.)

Clearly, injunctive relief "directed only at the symptoms" of a section 7 violation cannot entirely eliminate the increased market power achieved by an illegal acquisition. (Rogowsky, *The Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull. 187 (1986).) At best, such relief would mitigate such effects after long periods of time. For example, an injunction barring opening of new stores in markets affected by the merger (see RT Sept. 16, 1988, at pp. 15-20), might reduce the concentration levels which the District Court found evidenced the section 7 violation (697 F.Supp at pp. 1130-31). However, such an injunction would take years to remedy the extreme levels of concentration found by the District Court (697 F.Supp. at p. 1130), and would do nothing to mitigate the unlawful market power which American Stores will have during the intervening years if it is allowed to integrate the Alpha Beta and Lucky supermarket chains. (Rogowsky, *Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull.

at p. 190.) That is why the District Court concluded that without the preliminary injunction it ordered, if "the merger is subsequently found to be unlawful, it would be extremely difficult, if at all possible, to remedy effectively the unlawful merger." (697 F.Supp. at p. 1134.)

Even between the time this case is remanded to the District Court and actually tried, substantial irreparable harm is likely to be inflicted on California's consumers. (697 F.Supp. at p. 1135.) In *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F.Supp. 1250, 1276-77 (E.D.Pa. 1987), similar considerations led the District Court to conclude both that divestiture was available under section 16 and that a preliminary injunction holding the acquired firm separate from the acquiring firm was an appropriate means of preserving the viability of the acquired firm for later divestiture should the plaintiff in that case ultimately prevail. The Court's reasoning in *Tasty Baking* applies with equal force here:

> "Any diminution in Drake's post-divestiture competitive power clearly will harm consumers irreparably, and plaintiffs claim and I agree, will harm Tasty irreparably. Simply put, Tasty is better positioned to compete with Hostess if Hostess faces strong competition (keeping prices fair) in others. A contrary conclusion would leave defendants free to swallow up a competitor, to digest it in part, and upon a court order, to regurgitate insubstantial remains. No such result is acceptable." (653 F.Supp. at p. 1277.)

Unless reversed, the Ninth Circuit's decision in this case will result in the immediate loss of one of the four largest supermarket chains currently competing in California. (697 F.Supp. at p. 1134.) That result is unacceptable and should be prevented by this Court's grant of certiorari.

CONCLUSION

The Ninth Circuit's decision that divestiture is not a remedy available to the District Court cannot be justified by any policy underlying the antitrust laws or this Court's equity jurisprudence. As the First Circuit showed in *Petrolera Caribe*, it also cannot be justified by reference to the legislative history of section 16 of the Clayton Act. Resolution of the conflict between the circuits by this Court's reversal of the decision below is the only sure means of preventing the vast, irreparable injury this merger threatens to inflict on California's citizens. Accordingly, California respectfully submits that a writ of certiorari issue to the Ninth Circuit and that its decision overturning the preliminary injunction ordered by the District Court be reversed.

Respectfully submitted,

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APPENDIX A

STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

AMERICAN STORES CO.; ALPHA BETA ACQUISITION CORP.; LUCKY STORES, INC.,
Defendants-Appellants.

No. 88-6467.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1988.

Decided March 31, 1989.

Grocery retailer named as defendant in antitrust action by state of California arising out of proposed merger of supermarket chains appealed from orders of the United States District Court for the Central District of California, David V. Kenyon, J., 697 F.Supp. 1125, denying its motion to dismiss action and granting State's motion for preliminary injunction. The Court of Appeals, Wallace, Circuit Judge, held that: (1) statistical evidence of pre and postmerger market share and market concentration, along with expert testimony, supported finding that State made prima facie showing of § 7 of Clayton Act, and retailer's evidence of absence of meaningful barriers to market entry could be found not to have rebutted that showing; (2) State was entitled to preliminary injunction based on showing that it was likely to succeed on merits of its claim that merger might substantially lessen competition in relevant product market and possibility of irrepa-

rable harm if injunction were not granted; and (3) FTC consent order did not undo legal effect of merger, and preliminary injunction could not be used by State to obtain indirect divestiture and was thus overly broad.

Affirmed in part and reversed and remanded in part.

1. Federal Courts 767

Review by Court of Appeals of order granting preliminary injunction is limited.

2. Injunction 138.21

Degree of irreparable harm that must be shown in order to obtain preliminary injunction increases as probability of success on the merits decreases.

3. Monopolies 20(2)

Merger may substantially lessen competition by permitting one firm to control undue share of relevant market and by significantly increasing concentration of firms in that market. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

4. Monopolies 20(6)

District court could limit relevant product market to "supermarkets" — full line grocery stores with more than 10,000 square feet — rather than all retailers of grocery products, in assessing anticompetitive effect of merger of supermarket chains for purposes of motion for preliminary injunction. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

5. Monopolies 20(4)

Relevant indicia of merger's effects on competition are market shares of merging firms, degree of concentration in market, and degree to which that concentration is increased by merger. Clayton Act, § 1 et seq., as amended, 15 U.S.C.A. § 12 et seq.

6. Monopolies 24(3)

Statistical evidence of pre and postmerger market share and market concentration, along with expert testimony, supported finding that state of California established prima facie violation of § 7 of Clayton Act in connection with merger of supermarket chains. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

7. Monopolies 20(2)

Absence of entry barriers into market contrains anticompetitive conduct, irrespective of market's degree of concentration. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

8. Monopolies 24(13)

Grocery retailer could be found not to have rebutted State's prima facie showing of antitrust violation from merger of supermarket chains through evidence of absence of meaningful entry barriers into retail grocery market; in evaluating absence of entry barriers, district court had appropriately considered amount of capital necessary to become competitor in market, availability of capital, availability of technological advancements, number and size of customers or firms already operating in market, and structure and nature of industry. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

9. Monopolies 24(16)

Federal Trade Commission consent order, requiring grocery retailer to divest itself of 24 of its 54 supermarkets in Northern California and to agree to operate chain with which its chain was merging separately and to refrain from integrating companies' assets until conditions of consent order were satisfied, did not absolve all antitrust concerns in suit by state of California arising out of merger of chains; thus, State could be found likely to succeed on merits for purposes of its request for preliminary injunction. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

10. Monopolies 24(15)

State of California was entitled to preliminary injunction against supermarket chain merger, based on showing that it was likely to succeed on merits of its claim that effect of merger might be to substantially lessen competition in relevant product market and possibility of irreparable harm if injunction were not granted. Clayton Act, §§ 7, 16, as amended, 15 U.S.C.A. §§ 18, 26.

11. Monopolies 24(15)

Supermarket chains had merged and state of California could not obtain indirect divestiture of those chains by way of preliminary injunction, which was thus overly broad; Federal Trade Commission consent order merely forestalled complete integration of those chains and did not undo legal effect of merger under applicable Delaware law, and State could not even temporarily bootstrap itself into divestiture remedy to which it was otherwise not entitled by virtue of consent order designed to protect FTC's rights. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26; 8 Del.C. §§ 251-263.

12. Injunction 157

Preliminary injunctive relief should be narrowly tailored and should be no more burdensome than necessary to preserve plaintiff's ability to obtain complete permanent relief to which it is entitled.

13. Federal Civil Procedure 2533
Federal Courts 557

Motion to dismiss for failure to state claim upon which relief could be granted would be treated as summary judgment motion in light of district court's consideration of voluminous materials outside pleadings that were submitted by movant, and denial of that motion was thus not appealable. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Frank Rothman, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, Cal., for defendants-appellants.

H. Chester Horn, Jr., Deputy Atty. Gen., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, POOLE and O'SCANNLAIN, Circuit Judges.

WALLACE, Circuit Judge:

American Stores Company (American Stores), one of the nation's largest grocery retailers, appeals from orders denying its motion to dismiss and granting a motion for preliminary injunction in favor of the State of California. American Stores acquired 100% of the stock of Lucky Stores, Inc. (Lucky), one of American Store's major competitors in California. Approximately three months later, the California Attorney General initiated this anti-

trust action, both on his own behalf and in his capacity as *parens patriae* of the consumers of the state, challenging American Stores's acquisition of Lucky as a violation of section 7 of the Clayton Act, 15 U.S.C. § 18, section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright and Unfair Competition Acts, Cal.Bus. & Prof. Code §§ 16700-16761 and 17200-17208 (West 1987 & Supp.1989). The district court granted California's request for preliminary relief and ordered American Stores to operate Lucky separately and refrain from integrating the two companies' assets. *California v. American Stores Co.*, 697 F.Supp. 1125, 1135-36 (C.D.Cal. 1988) (*American Stores*). We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm in part and reverse and remand in part.

I

American Stores is California's fourth largest retail grocery chain, operating 252 "Alpha Beta" and "Skaggs Alpha Beta" (collectively Alpha Beta) supermarkets throughout the state. *Id.* at 1127. Lucky is the state's largest chain, operating 340 "Lucky Stores" and "Lucky Food Basket" supermarkets. *Id.* The acquisition began on March 21, 1988, when American Stores initiated a hostile takeover bid for all of Lucky's outstanding shares. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, American Stores notified the Federal Trade Commission (FTC) of its intentions. On May 23, 1988, American Stores increased its tender offer and Lucky's board approved the merger.

On May 31, 1988, the FTC suspended the merger by filing an administrative complaint charging that American Stores's acquisition of Lucky would violate section 7 of the Clayton Act and section 5 of the Federal Trade

Commission Act, 15 U.S.C. § 45. The FTC simultaneously filed a proposed consent order settling its charges on the condition that American Stores comply with certain demands. For example, the consent order required American Stores to divest itself of 24 of its 54 Alpha Beta supermarkets in Northern California. The consent order also contained an Agreement to Hold Separate (Hold Separate), whereby American Stores would be required to operate Lucky separately and to refrain from integrating the two companies' assets. The Hold Separate was to continue until American Stores satisfied all of the consent order's conditions.

American Stores agreed to the consent order, proceeded with the merger under its conditions, and by June 9, 1988, had acquired 100% of Lucky's outstanding stock. American Stores paid an aggregate price in excess of $2.5 billion. On September 1, 1988, California initiated this action, requesting as relief a Hold Separate similar to that of the FTC, rescission, divestiture, injunctive and declaratory relief, and "such other and further relief as the case requires."

II

[1] Our review of an order granting a preliminary injunction is limited. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988) (*Caribbean Marine*); *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (*Oakland Tribune*); *Sports Form, Inc. v. United Press International,,* 686 F.2d 750, 752 (9th Cir. 1982) (*Sports Form*). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court." *Zepeda v. United States Immigration and Naturalization Service*, 753 F.2d 719, 724 (9th Cir. 1983) (*Zepeda*); *United States v.*

Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987) (*Odessa Union*); *Sports Form*, 686 F.2d at 752.

> When reviewing an order issuing a preliminary injunction, an appellate court must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard. An injunction may also be set aside if the district court misapprehended the law on its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact. Absent one of these errors, the district court's decision will not be reversed merely because the appellate court would have arrived at a different result if it had initially applied the law to the facts of the case.

Caribbean Marine, 844 F.2d at 673 (citations omitted).

III

[2] We now consider whether the district court abused its discretion in granting California's motion for a preliminary injunction. To obtain a preliminary injunction, California "must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Odessa Union*, 833 F.2d at 174 (citation omitted); *Oakland Tribune*, 762 F.2d at 1376; *Sports Form*, 686 F.2d at 753. These formulations are not different tests but represent two points on a continuum in which the degree of irreparable harm that must be shown increases as the probability of success on the merits decreases. *Odessa Union*, 833 F.2d at 174; *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987); *Oakland Tribune*, 762 F.2d at 1376. The district court's order granting the preliminary injunction is reversible if the court did not employ these legal standards. *Zepeda*, 753 F.2d at 724.

[3] The district court found that California had shown a likelihood of success on the merits of its Clayton Act claim. To establish a prima facie violation of section 7 of the Clayton Act, California must prove that the effect of American Stores's acquisition of Lucky's stock "may be substantially to lessen competition." 15 U.S.C. § 18. A merger may substantially lessen competition by permitting one firm to control an undue share of the relevant market and by significantly increasing the concentration of firms in that market. *United States v. Philadelphia National Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (*Philadelphia National Bank*).

A.

American Stores argues that the district court improperly defined the relevant product market and thus erred in finding that the merger may substantially lessen competition. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962) (*Brown Shoe*) (footnote omitted). Where an increase in the price of one product leads to an increase in demand for another, both products should be included in the relevant product market. *E.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400, 76 S.Ct. 994, 1009-1010, 100 L.Ed. 1264 (1956).

[4] American Stores, though itself a supermarket chain, asserts that the relevant product market should not be limited to supermarkets. Rather, the market should include all retailers of grocery products, such as conve-

nience stores, "mom and pop" grocery stores, gasoline stations, delis, bakeries, and limited assortment warehouse hyper-stores. Consumers, according to American Stores, readily engage in demand substitution between different types of grocery retailers.

The district court accepted California's view that the relevant product market was limited to supermarkets — full-line grocery stores with more than 10,000 square feet. *American Stores,* 697 F.Supp. at 1129. The district court reasoned that only such supermarkets compete for consumers' periodic grocery shopping needs. *Id.* California presented expert testimony supporting this definition and offered American Stores's own internal marketing documents indicating that American Stores considers other supermarkets to be its only competitors.

Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion. But that ultimate determination must await our review of any subsequent permanent injunction. "Because our review of the law applied by the district court is so limited and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions provides little guidance on the appropriate resolution of the merits." *Zepeda,* 753 F.2d at 724. Indeed, after all evidence is presented at trial, the fact finder may come to a different view of the market. But for now, we are restricted to our limited review. The record shows that the district court, in making its preliminary assessment of the merits, understood the law. American Stores merely disagrees with its application. The facts upon which the district court relied were not clearly erroneous. They were supported by expert testimony. Confronted with two competing theories of the market,

both supported by evidence, the district court exercised its judgment concerning the cross-elasticity of demand. At this stage, we do not resolve conflicts in the evidence. *FTC v. Warner Communications Inc.,* 742 F.2d 1156, 1164 (9th Cir. 1984) (*Warner Communications*). We therefore conclude that the district court did not abuse its discretion in limiting the product market to the described supermarkets.

B.

[5] American Stores argues that the district court erred in its analysis of the merger's effects on competition. Relevant indicia of competitive effects are (1) the market shares of the merging firms, (2) the degree of concentration in the market, and (3) the degree to which that concentration is increased by the merger. *See United States v. Von's Grocery Co.,* 384 U.S. 270, 277-78, 86 S.Ct. 1478, 1482, 16 L.Ed.2d 555 (1966); *Philadelphia National Bank,* 374 U.S. at 363-65, 83 S.Ct. at 1741-43; *Brown Shoe,* 370 U.S. at 322 n. 38, 82 S.Ct. at 1522 n. 38. Statistics that indicate excessive post-merger market share and market concentration create a presumption that the merger violates the Clayton Act. *Philadelphia National Bank,* 374 U.S. at 363, 83 S.Ct. at 1741.

[6] Both American Stores and California submitted considerable statistical evidence and pre- and post-merger market share and market concentration. *American Stores,* 697 F.Supp. at 1130. The district court, using the geographic market defined by American Stores, found American Stores's average post-merger market share to be 24%, with a range from 15% to 38% in individual areas. Two-firm concentration would increase from a pre-merger average of 51% to a post-merger average of 56% and four-firm concentration would increase from an aver-

age of 73% to 79%. *Id.* The district court also used an additional statistical method, the Herfindahl-Herschman Index (HHI), to evaluate the effects of the merger. *Id.* The court found the the HHI indicated a highly concentrated post-merger market. *Id.* Finally, the court considered statistical data of historical market share trends. American Stores offered data which it contended reflected a decrease in market concentration. California offered more extensive evidence showing an increase in concentration. *Id.* at 1131.

The district court found that the statistical evidence of market share, market concentration, and market concentration trends created a presumption that American Stores's acquisition of Lucky would lessen competition substantially. *Id.* We cannot conclude that the statistics upon which the district court relied were clearly erroneous. All of the statistics were supported by expert testimony. Likewise, the district court did not misapprehend the law in its preliminary assessment of the merits. The district court understood the legal definition of a highly concentrated market and the types of evidence that are probative of market concentration. The district court's evaluation of the statistical evidence required an exercise of judgment. We therefore hold that the district court did not abuse its discretion in finding that California had established a prima facie violation of section 7 of the Clayton Act.

American Stores can rebut the district court's determination of a prima facie violation of section 7 through evidence demonstrating that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45

L.Ed.2d 41 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-504, 94 S.Ct. 1186, 1193-1197, 39 L.Ed.2d 530 (1974). The burden to rebut the presumption of illegality is on American Stores. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974).

[7] An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of the market's degree of concentration. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33, 93 S.Ct. 1096, 1100-01, 35 L.Ed.2d 475 (1973) (finding that the potential for Falstaff brewer to enter the market might constrain brewers in Northeast to maintain competitive prices). American Stores argues that it rebutted the presumption of illegality by demonstrating an absence of meaningful entry barriers into the retail grocery market. The district court found that American Stores had not satisfied its burden. *American Stores*, 697 F. Supp. at 1133. Although American Stores makes a compelling case for easy entry into the market, we can reverse the district court only if its finding was clearly erroneous.

[8] To show an absence of entry barriers, American Stores offered evidence of two recent entrants into the retail grocery market. The first, Market Wholesale Grocery Co., had plans to purchase 15 stores that Alpha Beta and Lucky were required to divest pursuant to the FTC's consent order. *Id.* at 1132. The district court found that this entry, based on the events that triggered it, was not probative of an absence of barriers. *Id.* The second recent entrant, Richard London, testified that he had opened four "Major Market" stores in the past two years. *Id.* The district court found that London's stores were not part of the relevant product market. *Id.* American Stores also offered the declarations of William Christy and Donald

Kaplan, both industry participants, who testified that entry into the retail grocery market is not difficult. California provided expert testimony to the effect that entry barriers do exist in the grocery market. California's expert identified these barriers as: (1) store economies of scale; (2) multi-store economies of scale, such as advertising costs; (3) capital costs and risk; (4) the difficulty of obtaining desirable store sites; and (5) strategic behavior by incumbent chains such as zone pricing and geographic preemption.

The district court, in evaluating the absence of entry barriers, considered the following factors: (1) amount of capital necessary to become a competitor in the market; (2) availability of capital; (3) availability of technological advancements; (4) number and size of customers or firms already operating in the market; and (5) structure and nature of the industry. *Id.* We have recognized that consideration of these factors is appropriate. *See Warner Communications,* 742 F.2d at 1163-64. Thus, the district court did not misapprehend the law. We do not find as a matter of law that entry into the market for retail supermarkets is difficult. Rather, we recognize that both parties offered competing evidence. We must therefore conclude that the district court's holding that American Stores did not satisfy its burden of rebutting California's prima facie showing of a violation of section 7 was not an abuse of discretion.

C.

[9] Finally, American Stores argues that the district court's conclusion of California's likelihood of success on the merits was in error because the FTC's consent order resolved all antitrust concerns. At a minimum, American Stores contends, the FTC's findings should be afforded

considerable deference. For this proposition, American Stores relies on *Lieberman v. FTC,* 771 F.2d 32 (2d Cir.1985) (*Lieberman*), and *Mattox v. FTC,* 752 F.2d 116 (5th Cir.1985) (*Mattox*).

Neither *Lieberman* nor *Mattox* discussed the appropriate degree of deference that a federal court should afford an FTC consent order when the FTC is not a party to the action. Rather, these cases addressed a narrow issue of statutory interpretation, namely, whether section 7A(h) of the Clayton Act prohibits the FTC from providing to state attorneys general premerger information filed pursuant to the Hart-Scott-Rodino Act. *Lieberman,* 771 F.2d at 33; *Mattox,* 752 F.2d at 117. Thus, *Lieberman* and *Mattox* provide no support for American Stores's argument.

More analogous is *United States v. Borden Co.,* 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954), where the Supreme Court examined the legal effect of a consent decree on a subsequent antitrust action brought by the United States. Holding that the prior consent decree did not bar the action, the Court explained that "private and public [Clayton Act] actions were designed to be cumulative, not mutually exclusive." *Id.* at 518, 74 S.Ct. at 706. The Court reasoned that private and public interests in antitrust actions may not necessarily coincide. *Id.* at 518-20, 74 S.Ct. at 706-07. We think this reasoning applies here. California may have different interests than does the FTC in protecting its citizens from antitrust violations. *See Arvin Industries, Inc. v. Maremont Corp.,* 1973 Trade Cas. (CCH) § 74,416, 1973 WL 784 (S.D.Ind.1973). We do not hold that federal courts should give no deference to FTC consent orders. Rather, we hold that in this case the district court did not abuse its discretion in finding a likelihood of success on the merits.

IV

[10] As we pointed out above, California may obtain a preliminary injunction by showing both a likelihood of success on the merits and the possibility of irreparable harm. *Odessa Union,* 833 F.2d at 174; *Oakland Tribune,* 762 F.2d at 1376; *Sports Form,* 686 F.2d at 753. The district court decided that the irreparable harm that would result absent an injunction is the lessening of competition. *American Stores,* 697 F.Supp. at 1134. We agree with the district court that this is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent. *See* 15 U.S.C. § 26; *United States v. BNS, Inc.,* 858 F.2d 456, 466 (9th Cir.1988) (*BNS*). Indeed, the district court's determination of irreparable harm follows naturally from its holding of likelihood of success on the merits. We hold that the district court did not abuse its discretion in granting California's motion for a preliminary injunction. Because California's showing of likelihood of success on merits and possibility of irreparable harm satisfies the prerequisites for granting a preliminary injunction, we need not address American Stores's arguments concerning the balance of hardships.

V

Section 16 of the Clayton Act allows any party to sue for injunctive relief against threatened loss or damage resulting from a violation of the antitrust laws. 15 U.S.C. § 26. American Stores contends that the relief that the district court ordered in its preliminary injunction is not available to California under section 16 of the Clayton Act. The district court's order required the following of American Stores:

1. Take all steps necessary to operate American Stores Company, Alpha Beta Acquisition Corporation and their subsidiaries, divisions and groups (collectively "American Stores"), independently of the assets and businesses of Lucky Stores, Inc. ("Lucky") in the State of California.

2. Refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988, other than in the ordinary course of business, and shall refrain from taking any further steps to merge or integrate the assets and businesses of American Stores' Alpha Beta California operations with those of Lucky's California operations or any further steps to merge or integrate the assets and businesses of Lucky's California operations with those of American Stores' Alpha Beta California operations.

American Stores, 697 F.Supp. at 1136. American Stores argues that this order requires divestiture, rescission, or dissolution — forms of relief not available in a permanent injunction to private parties under section 16. According to American Stores, because a preliminary injunction is designed solely to preserve the ability to award permanent relief, the district court abused its discretion by ordering in a preliminary injunction relief that it cannot award in a permanent injunction.

In *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913, 920 (9th Cir.1975) (*IT & T*), we held "that divestiture is not an available remedy in private actions under § 16 of the Clayton Act." *See also Bosse v. Crowell Collier & MacMillan,* 565 F.2d 602, 607 (9th Cir.1977) (*Bosse*) ("divestiture is not an available remedy in private actions [under section 16]"); *Calnetics Corp. v. Volkswagen of America,*

Inc., 532 F.2d 674, 692 (9th Cir.) (*Calnetics*) ("remedy of divestiture is not available to private plaintiffs in antitrust suits"), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976). We also held in *IT & T* that section 16 does not permit indirect divestiture, that is, an injunction which on its face does not order divestiture but which has the same effect. *IT & T*, 518 F.2d at 924. For example, we observed that an injunction barring a corporation from voting the stock of, or exercising any control over its subsidiaries, or from obtaining representation on the board of directors of an acquired company, is in effect a directed divestiture. Such an injunction, therefore, could not be ordered under section 16. *Id.*

[11] The district court's injunction on its face did not order divestiture. Rather, similar to the FTC's consent order, it required a Hold Separate preventing the integration of two wholly-owned subsidiaries of a common parent. American Stores insists that the district court's Hold Separate is divestiture by another name. California, on the other hand, asserts that the district court's order merely maintained the status quo. On the date the district court entered the preliminary injunction, American Stores, pursuant to the FTC's consent order, was operating its Alpha Beta and Lucky subsidiaries separately. Thus, California argues, the injunction did not order the type of retrospective relief that *IT & T* held to be unavailable under the Clayton Act.

The district court reasoned that the Hold Separate could be granted because Lucky and Alpha Beta's operations had yet to be integrated completely due to the existence of the FTC's consent order. The district court apparently believed that the merger had not been consummated. Thus, the preliminary injunction, in the district

court's view, did not order divestiture or dissolution. *American Stores*, 697 F.Supp. at 1133-34.

We conclude that the district court misapprehended the law of divestiture. Our decisions in *IT & T*, *Bosse*, and *Calnetics* are clear that divestiture, whether direct or indirect, is not an available form of relief under section 16 for a private party such as California. The preliminary injunction in this case prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors. In other words, these stores must operate as if Lucky had never been acquired by American Stores at all. Such an injunction requires indirect divestiture. *See IT & T*, 518 F.2d at 924.

The district court also misapprehended the law governing corporate mergers in concluding that the merger had not been completed. Prior to the issuance of the injunction, American Stores had acquired all of the outstanding stock of Lucky. Under Delaware law, applicable here because all parties to the merger were Delaware corporations, the merger had already taken place. *See* Del.Code Ann. tit. 8 §§ 251-263 (1983 & Supp.1988). The FTC's consent order did not undo the legal effect of this merger; it merely forestalled the complete integration of Lucky and Alpha Beta. The district court thus misunderstood the legal status of the merger, and this error compounded its misapprehension of the law of divestiture.

[12] The purpose of the consent order was to preserve the FTC's ability to seek divestiture if American Stores did not comply with its conditions. But California, unlike the FTC, cannot obtain divestiture relief. Under these circumstances, we do not believe that California,

which is otherwise not entitled to divestiture, should be able to bootstrap itself into this remedy, even temporarily, by virture of a consent order designed to protect the rights of the FTC, which is entitled to sue for divestiture. Preliminary injunctive relief should be narrowly tailored, and should be no more burdensome than necessary to preserve a plaintiff's ability to obtain the complete permanent relief to which it is entitled. *See Zepeda*, 753 F.2d at 728 n. 1. There must be some reasonable relationship between the preliminary injunction and the permanent relief requested: the preliminary relief granted should ensure the availability of permissible permanent relief sought. That relationship is missing from the preliminary injunction granted here, particularly in light of the district court's misapprehension of the law of divestiture and merger. In these circumstances, we conclude that the preliminary injunction was overly broad. *See BNS*, 858 F.2d at 465-66 (overly broad preliminary injunction an abuse of discretion). We therefore hold that to the extent that the district court ordered American Stores to operate its subsidiaries separately, the district court abused its discretion. *See id.; See also Zepeda*, 753 F.2d at 724 (preliminary injunction may be reversed because court applies "acceptable preliminary injunction standard in a manner that results in an abuse of discretion").

Our holding does not foreclose California's ability to obtain injunctive relief. To the contrary, relief "directed at the symptoms rather than the underlying cause" remains available. *IT & T*, 518 F.2d at 925. On remand, the district court is free to consider granting such relief.

We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney

General chose not to do so. California must accept the consequences of his choice.

VI

[13] American Stores appeals the district court's order denying its motion to dismiss for failure to state a claim upon which relief can be granted. American Stores submitted voluminous materials outside the pleadings which the district court considered. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides: "If . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . ." *See, e.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1532-33 (9th Cir.), *cert. denied*, 474 U.S. 826, 106 S.Ct. 85, 88 L.Ed.2d 70 (1985); *Garaux v. Pulley*, 739 F.2d 437, 439-40 (9th Cir.1984). Thus, we review American Stores's motion as one for summary judgment. Because no final judgment has been entered in this case, and the denial of a motion for summary judgment is not a final order, we lack jurisdiction to entertain American Stores's motion. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976).

Each side should bear its own costs.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX B

THE STATE OF CALIFORNIA, BY ITS ATTORNEY GENERAL JOHN K. VAN DE KAMP,
Plaintiff,

v.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORP., LUCKY STORES, INC.,
Defendants.

No. CV 88-5331 KN.

United States District Court,
C.D. California.

Sept. 29, 1988.

State of California brought action to enjoin merger of assets and businesses of two grocery store chains. The District Court, Kenyon, J., held that: (1) State established prima facie violation of § 7 of Clayton Act; (2) two supermarket chains failed to rebut presumption that their proposed merger would substantially lessen competition in violation of § 7 of Clayton Act; and (3) State of California was entitled to preliminary injunction to enjoin merger.

Injunction issued.

1. Monopolies 24(12)

Presumption of Clayton Act violation based on post-merger market statistics is not conclusive and can be overcome, but only by showing that statistics do not accurately reflect probable effect of proposed merger on

competition. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

2. Monopolies 24(13)

In order to analyze whether statistical evidence on market concentration resulting from particular proposed merger establishes presumption that merger may substantially lessen competition in violation of Clayton Act, relevant product and geographic markets in which competition may be affected must be defined. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

3. Monopolies 24(13)

State established prima facie violation of § 7 of Clayton Act in action to enjoin merger of assets and businesses of two supermarket chains; statistical evidence concerning postmerger market shares and concentration, as well as market concentration trends, overwhelmingly created presumption that increased concentration in relevant markets, which would result from proposed merger, would substantially lessen competition. Clayton Act, § 7, 15 U.S.C.A § 18.

4. Monopolies 24(12)

Presumption that proposed merger violates Clayton Act if it results in merged business having certain percentage of market share is not irrebutable but can be overcome by evidence that market share statistics give inaccurate account of merger's probable effect on competition. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

5. Monopolies 24(12)

Two supermarket chains failed to rebut presumption that their proposed merger would substantially lessen

competition in violation of § 7 of Clayton Act; supermarket chains failed to demonstrate ease of entry into retail grocery industry, and merger could not be justified on basis that it would allow greater efficiency of operation. Clayton Act, § 7, 15 U.S.C.A § 18.

6. Monopolies 28(9)

Clayton Act allows any person to sue for injunctive relief against threatened loss or damage by violation of antitrust laws. Clayton Act, § 16, 15 U.S.C.A. § 26.

7. Monopolies 24(7)

State of California was entitled to preliminary injunction to enjoin merger of assets and businesses of two supermarket chains; Californians would be irreparably harmed by decrease in competition if proposed merger was completed, if preliminary relief was not awarded and merger was subsequently found to be unlawful it would be extremely difficult if not possible to effectively remedy the unlawful merger, and harm to California residents outweighed any harm supermarket chains would suffer as result of injunction. Clayton Act, § 16, 15 U.S.C.A. § 26.

John K. Van de Kamp, Los Angeles, Cal., pro se.

Andrea Sheridan Ordin, Sanford N. Gruskin, Owen Lee Kwong, H. Chester Horn, Jr., Lawrence R. Tapper, Ernest Martinez, Los Angeles, Cal., for State of Cal.

Frank Rothman, Stephen M. Axinn, Paul T. Denis, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, Cal., for defendants.

ORDER RE PRELIMINARY INJUNCTION; PRELIMINARY INJUNCTION

KENYON, District Judge.

The Court, having received and considered Plaintiff State of California's Application for a Preliminary Injunction and the papers filed in support thereof and in opposition thereto, HEREBY GRANTS Plaintiff's application.

I

BACKGROUND

Plaintiff, State of California, through its Attorney General, John K. Van de Kamp, ("State") brought this action to enjoin the merger of the assets and businesses of Lucky Stores, Inc. ("Lucky") and American Stores Company, Alpha Beta Acquisition Corporation, and their respective subsidiaries ("Alpha Beta").

The parties to this proposed merger are the first and fourth largest supermarket chains in California and two of the ten largest grocery chains in the United States. Both Alpha Beta and Lucky are principally engaged in the retail sale of food and related products for off-premises consumption. In California, Alpha Beta operates 252 "Alpha Beta" and "Skaggs Alpha Beta" retail supermarkets. Lucky operates 340 "Lucky Stores" and "Lucky Food Basket" retail supermarkets. Memorandum In Opposition for Motion For Preliminary Injunction at 4 ("Opp. to Inj."). The proposed Lucky/Alpha Beta acquisition follows on the heels of a merger by the second and third largest grocery chains in California, Vons and Safeway.

The State's purpose in seeking the preliminary injunction is "to maintain the status quo for consumers — the existence of at least three competing supermarket chains." Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order at 4 ("TRO Application"). The State maintains that the effect of the Lucky/Alpha Beta proposed merger may be substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18; Section 1 of the Sherman Act, 15 U.S.C. § 1; the Cartwright Anti-Trust Act, California Business and Professions Code, sections 16770, *et seq.*; and the Unfair Business Practices Act, California Business and Professions Code, sections 17200, *et seq.*

II.

DISCUSSION

In order to grant a preliminary injunction, the Court must consider the following factors: (1) Whether plaintiff has demonstrated, at the minimum, a fair chance of success on the merits. *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers,* 584 F.2d 308, 315, (9th Cir.1978), *cert. dismissed,* 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979); (2) Whether plaintiff has demonstrated a significant threat of irreparable injury. *Oakland Tribune, Inc. v. Chronicle Publishing Co.,* 762 F.2d 1374, 1376 (9th Cir.1985); and (3) Whether plaintiff has demonstrated at least a minimal tip in the balance of

hardships even when the strongest showing on the merits is made. *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1203-04 (9th Cir.1980). As the Ninth Circuit stated in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 87 (9th Cir.1975), a court may issue a preliminary injunction if the moving party demonstrates "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." The court has stated that these two tests are not inapposite but merely extremes of a single continuum:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly.

Benda, 584 F.2d at 315. In *FTC v. Warner Communications Inc.,* 742 F.2d 1156, 1162 (9th Cir.1984), the Ninth Circuit reversed the district court's denial of the Federal Trade Commission's ("FTC") application for a preliminary injunction on the grounds that the government had adequately met its burden of demonstrating likelihood of success on the merits. The FTC brought an action to block a proposed joint venture involving two record companies. In determining whether 'likelihood of success' had been established, the court noted that its task was "not to make a final determination on whether the proposed merger violates Section 7 (of the Clayton Act), but rather to make only a preliminary assessment of the merger's impact on competition." *Id.*

A. The Prima Facie Case

[1] Case law has established guidelines for determining whether the effect of a proposed merger may be "substantially to lessen competition" in violation of the Clayton Act.

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

United States v. Philadelphia National Bank, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (finding that where top four firms had market share of 78%, post-merger market share raised inference merger was anticompetitive). The Court further stated that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n. 42, 83 S.Ct. at 1742-43 n. 42. Statistical evidence of market share and concentration resulting from a merger can establish a prima facie case or the presumption that the proposed merger would substantially lessen competition in violation of the Clayton Act. *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 631, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974). The presumption of a Clayton Act violation based on the post-merger market statistics is not conclusive and can be overcome, but only by a showing that the statistics do not accurately reflect the probable effect of the proposed merger on competition. *Id. See also United States v. Gen-*

eral Dynamics Corp., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974).

Recent cases use a variety of statistical indicators to determine whether a proposed merger can be presumed to substantially lessen competition. Post-merger market share is one indicator. Indicators of market concentration can be developed by determining the total percentage of market share held by the top two, three, four, etc. firms before and after the merger. The Herfindahl-Hirshman Index, ("HHI"), is another means to analyze market concentration. The HHI is calculated by summing the squares of the percentages of market share held by each of the firms in a given market, and therefore reflects the distribution of the market shares of the entire market, not just the top few firms.

Under the 1984 version of the Merger Guidelines of the United States Department of Justice, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market. Where the post-merger market would be in the moderately concentrated range, a merger that increases the HHI by more than 100 points will, absent other factors, present serious antitrust questions. Where the post-acquisition market would be highly concentrated, an increase of more than 50 HHI points will present serious antitrust questions. Dept. of Justice, *Merger Guidelines*, ¶ 2, 49 Fed.Reg. 26823 (1984). *See, e.g., RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir.1979) (merger of second and fifth largest firms found anticompetitive where result was post-merger market share increase from 12% to 19%, four-firm concentration increase from 65% to 72%, and eight-firm concentration increase from 81% to 84%); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., Inc.*, 600 F.Supp. 1326 (E.D.Mich.), *aff'd*,

753 F.2d 1354 (6th Cir.1985) (proposed merger found to substantially lessen competition based on statistical evidence of post-merger market share of 31%, four-firm concentration increase from 78% to 89%, HHI increase from 1746 to 2120, and general trend toward concentration); *Marathon Oil Co. v. Mobil Corp.*, 530 F.Supp. 315 (N.D.Ohio), *aff'd*, 669 F.2d 378 (6th Cir.1981) (acquisition enjoined based on post-merger combined market share of 10-20% in relevant markets, four-firm concentration increase from 48% to 53% on average, and general trend toward concentration.) *Cf. United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir.1984) (prima facie illegality of merger based on post-merger market share of 49% successfully rebutted by evidence that market power did not result).

[2] In order to analyze whether the statistical evidence of market concentration resulting from a particular proposed merger establishes a presumption that the merger may substantially lessen competition in violation of the Clayton Act, the relevant product and geographic markets in which competition may be affected must be defined. *Marine Bancorporation*, 418 U.S. at 618, 94 S.Ct. at 2868. "[T]he outer boundaries of a product market can be determined by the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *RSR*, 602 F.2d at 1317, 1320, citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962). The effects of a merger must also be examined in each well-defined and economically-significant product submarket. *Id.* at 1320-21. Products which are reasonably interchangeable are "products to which consumers would switch if there were a small but significant non-transitory price increase." *United States v. Calmar, Inc.*, 612 F.Supp. 1298, 1301 (D.N.J. 1985).

The State defines the relevant product market in this case as "supermarkets," full line grocery stores with more than 10,000 square feet. The State contends that, realistically, only such supermarkets compete for the consumers' weekly or periodic grocery shopping needs and other outlets which also sell groceries, such as convenience stores, etc., serve consumers' needs in a distinctly separate market. TRO Application at 10-12. Defendants, on the other hand, contend that the relevant product market includes retail grocery purchases from a far wider range of outlets and should include groceries sold by smaller "mom and pop" retail grocery stores, convenience stores, and non-grocery stores such as department stores, gasoline service stations, eating and drinking places, drug stores, and liquor stores. Max Supp. Decl. at 2. Defendants argue that these outlets directly compete with supermarkets for the grocery dollar of the consumer, and contend, for example, that convenience stores frequently match or undercut supermarket prices. Opp. to Inj. at 13-14. *Cf. The Grand Union Co.*, 102 F.T.C. at 1046-47 (noting that determination of which non-supermarket food retailers to include in product market line is somewhat arbitrary).

The Court is not persuaded that the relevant product market in this case contains food purchases from the broad range of outlets contended by defendants, nor that grocery shoppers seriously consider, for example, gasoline service stations or department stores as competing sources with supermarkets for their grocery needs. Even if convenience stores competitively price a few food items, such as bread and milk, in direct competition with supermarkets, such is not sufficient to justify inclusion of all retail grocery sales from whatever outlet in the relevant product market in this case. In fact, the State has presented evidence that defendants' own marketing documents focus on supermarket shoppers and competition from other supermarkets and do not evaluate convenience stores, gasoline service stations, etc. as competitors. TRO Application at 11.

The relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *RSR*, 602 F.2d at 1323, quoting *Brown Shoe*, 370 U.S. at 336-37, 82 S.Ct. at 1529-30. Defendants define the relevant geographic area as 14 individual Metropolitan Statistical Areas, ("MSAs"), as defined by the Office of Management and Budget.[1] Opp. to Inj. at 9. The State, however, contends that these areas are too large to represent a relevant geographic market and that they ignore natural boundaries and practical realities. For example, the San Diego MSA is an area 60 miles by 60 miles, Transcript of Proceedings, September 16, 1988, at 63, an area which the State contends is too large to represent the trading area served by an individual grocery store, and which aggregates stores which are simply not in substantial competition with each other. The State argues that, instead, there are a number of distinct markets within these 14 MSAs totaling 62 separate relevant geographic markets. TRO Application at 12-15; Harris Decl. at 33-54.

However, because acceptance of either of these definitions of relevant geographic markets is not dispositive to the outcome of the current analysis, the Court will for now assume that the defendants can prevail at trial on their contention that the relevant geographic markets are represented by the fourteen MSAs they have defined.

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[1]The 14 MSAs are: Los Angeles, Santa Barbara, Anaheim, Bakersfield, Oxnard/Ventura, Riverside/San Bernardino, San Diego, Oakland, Monterey/Salinas, San Francisco, San Jose, Santa Cruz, Santa Rosa, and Vallejo/Napa.

As defined above, the statistical indicators of market share and concentration in the relevant markets resulting from the proposed merger of the Lucky and Alpha Beta supermarket chains can be analyzed to determine whether the merger is inherently likely to lessen competition substantially. Across the fourteen MSAs defined by defendants, the post-merger market share would be significant, averaging 24%, with a range from 15% to 38% in individual MSAs. Two firm concentration would increase from a pre-merger average of 51% (range, 35%-70%) to a post-merger average of 56% (range, 46%-73%). Four firm concentration would increase from an average of 73% (range, 62%-84%) to a post-merger average of 79% (range, 67%-88%). Harris Decl., Appendix II at 111-320. These numbers indicate the proposed merger would result in further concentration of an already highly concentrated market. Even using the defendants' more expansive definition of the relevant product market, the post-merger market share would still be significant, averaging 19%, and the four firm concentration would be 56%, still indicating a highly concentrated market. Defendants' Supplemental Memorandum Re Market Definition and Market Structure, Exh. B ("Def. Market Memo.").

The parties submitted vast quantities of data showing calculation of post-merger HHIs and the corresponding HHI increase resulting from the proposed merger. Suffice it to summarize that across the 14 MSAs defined in this case and based on "supermarkets" as the relevant product market, post-merger HHIs average 2040 (range, 1416-2769), with 10 of the 14 MSAs individually exceeding the 1800 level, indicating a highly concentrated market. The increase in HHI due to the proposed merger averaged 245 points across the 14 MSAs and was at least 100 points in

each MSA, therefore raising serious antitrust concerns.[2] Harris Reply Decl. at 17.

Even considering the more expansive relevant product market definition argued by the defendants, the Court notes that the first set of data supplied by defendants showed an average post-merger HHI across the 14 MSAs of 1250, with an average increase in HHI due to the merger of 130 points. Max Decl., Exh. 3 at 38. Such numbers indicate antitrust concerns and, specifically, in 9 of the 14 individual MSAs, the individual post-merger HHI and corresponding HHI increase indicated antitrust questions. Defendants subsequently expanded their definition of the relevant product market even further, and therefore produced a second set of data bringing the average post-merger HHI down to 990, with an average increase of 100 points, and specifically showing antitrust concerns under the Merger Guidelines in only three individual MSAs. Def. Market Memo., Exh. A; Max Supp. Decl., Exh. 5. Defendants contend that these numbers show that none of the relevant markets will be unduly concentrated or significantly increased in concentration as a result of the proposed merger. Def. Market Memo. at 22.[3]

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[2]If the relevant geographic market is defined in terms of 62 smaller geographic markets as contended by the State, the post-merger HHI averages 2380, with an average increase of 250 points due to the proposed merger. Harris. Decl. at 69-70.

[3]Defendants contend that their updated calculation of, for example, the Santa Cruz MSA's post-merger HHI (by their most recent and expansive product market definition) at 998 conclusively raises no competitive concerns despite an HHI increase of 110 points, while implicitly stating that competitive concerns would be raised if the Santa Cruz post-merger MSA had been 1001. Max Supp. Decl. at 3. Such precision, however, is more than the calculation HHIs, as

The Court also requested additional briefing by the parties on market share trends in the relevant markets. Although the defendants contend that their data shows a decrease in market concentration, Def. Market Memo. at 3, the more extensive data provided by the State clearly shows a substantial trend to increased concentration in all but one MSA using the State's definition of the relevant product market, and in at least two-thirds of the relevant MSAs using defendants' definition of the relevant product market. On average across all MSAs, concentration in the relevant product markets as defined by either party's definition has increased by over 30% since 1982, excluding the effects of this proposed merger. Harris Supp. Reply Decl. at 5-17.

[3] The Court finds that the statistical evidence concerning post-merger market shares and concentration, as well as market concentration trends, overwhelmingly creates the presumption that the increased concentration in the relevant markets which would result from the proposed merger between the Lucky and Alpha Beta supermarket chains would substantially lessen competition in those markets, and presents a prima facie violation of Section 7 of the Clayton Act.

B. Ease of Entry

[4] The presumption that a proposed merger violates the Clayton Act if it results in a certain percentage of market share is not irrebuttable. *United States v. General Dynamics*, 415 U.S. 486, 494-504, 94 S.Ct. 1186, 1192-1197, 89 L.Ed.2d 530 (1974). The presumption can be overcome by evidence that the market share statistics give an inaccurate account of the merger's probable effect on

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indicators of market concentration and antitrust concerns, can conclusively provide.

competition. *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45 L.Ed.2d 41 (1975). The burden of proof, however, rests squarely on defendants. *Marine Bancorporation*, 418 U.S. at 618, 94 S.Ct. at 2868. Therefore, even if a merger results in a high degree of concentration, if a firm can easily enter into the market, it is unlikely that the remaining producers in the market will be able to exercise market control. *United States v. Clamar, Inc.*, 612 F.Supp. 1298, 1301 (D.N.J.1985).

In general, the lower the barriers to entry, the less likely it will be that, as a consequence of acquisition, remaining firms in the target market can successfully raise prices by "unilateral action, interdependent coordination or express collusion." *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D.Cal.1976) (stating that substantial entry and exit rates in firms and products indicates that entrance is relatively easy and that healthy competition is present within relevant market). On the other hand, where barriers to entrance into the target market are high, a merger or acquisition may create a potential for significant market power that is "unlikely to be tempered by the threat that future entry will prevent or frustrate anticompetitive output and pricing decisions by firms in the target market." *The Grand Union Co.*, 102 F.T.C. 812, 1064 (1983). Evidence of low entry barriers includes recent entry into the target market, or recent capacity expansion by existing competitors in that market. *Id.* In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1263 (E.D.Pa.1987), the court found substantial barriers to entry in the snack cake and pie business. The barriers plaintiffs' experts discussed included the high cost to build bakeries; to develop brand recognition; and to establish routes with favorable retailer participation. *Id.* In concluding that defendants had

failed to meet their burden of proof that entry barriers did not exist and in granting a preliminary injunction, the court stated that since "[d]efendants presented no significant evidence that existing producers will enter these relevant markets as new competitors within the foreseeable future, . . . I find plaintiffs likely to prove that the existing market shares provide a meaningful basis on which to evaluate the future significance of the acquisition." *Id.* at 1264.

While the Supreme Court has never directly held that ease of entry may rebut a showing of prima facie illegality under *Philadelphia National Bank*, it has held that potential competition from firms not presently active in the relevant product and geographic markets must be taken into account. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973) (concluding that existence of Falstaff brewer as potential entrant might constrain brewers in northeast to maintain competitive price levels as means of forestalling entry by Falstaff). *See* 4 von Kalinowski, Antitrust Laws and Trade Regulation § 19.02[3] n. 120 (1979) (stating that conditions of entry have been identified as one of the two most important factors constraining a firm to behave competitively, the other factor being "numbers").

In *United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (2d Cir.1984), the court considered ease of entry in the trash collection market and concluded that entry into the market was "so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation." As foundation for this conclusion, the court stated that "[a] person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself and operate out of his home." Entrants into the

supermarket industry, unlike the trash collection market, can face a much more complex array of barriers. Typically, the ease or difficulty with which a firm can enter a given industry depends on such factors as: (1) amount of capital necessary to become a competitor in the market; (2) availability of capital; (3) availability of technological advancements; (4) number and size of customers or firms already operating in the market; and (5) structure and nature of the industry. 4 Antitrust Laws and Trade Regulation § 19.02[3].

[5] As the Supreme Court stated in *Marine Bancorporation*, 418 U.S. at 602, 94 S.Ct. at 2860, the burden is on defendants to rebut the presumption of illegality demonstrated by the market share percentage. Defendants have failed to demonstrate evidence of low entry barriers. Although defendants assert that entry into the California market is easy, their lack of evidence to support this contention produces an inference to the contrary. According to defendants, supermarkets in California can be opened rapidly and without obstacles in response to any opportunity to earn a good level of return. Max Decl. at 14. Yet, defendants have produced no evidence of such an occurrence. Moreover, defendants' declarations assert that sites for new construction or remodeling are readily available but fail to explain who has taken advantage of this abundance of available space. Guillory Decl. ¶ 5-9. Defendants submit through a declaration of Keith Thye that entry is further facilitated by grocery product wholesalers actively involved in selecting and obtaining sites for new entrants; financing the purchase of inventory, fixtures and equipment; and providing back office assistance such as data processing. Thye Decl. ¶ 9-11. Mr. Thye, president and Chief Operating Officer of Market Wholesale Grocery Co., however, plans to purchase 15 of the 37 stores that Alpha Beta and Lucky are required to

divest in accordance with the FTC consent order. Consequently, entry barriers may not appear to him to be too high. Defendants also submit the declaration of Richard London, an independent consultant to Lucky Stores and president of Major Market, Inc., a company formed to open, own and operate a chain of grocery stores in Southern California. Mr. London contends that the grocery business is extremely competitive, that entry barriers are low, and that there is certainly room for a new chain of grocery stores in the Southern California area. London Decl. ¶ 7-8. However, defendants' declarations appear to be based on entry into a far broader product market than the Court believes is appropriate. See discussion, *supra* at 1129.

The defendants advance the additional argument that the merger can be justified because it allows greater efficieney of operation. Lillie Decl. ¶ 5. John M. Lillie, chairman of the board and chief executive officer of Lucky, declared that the blending of Alpha Beta and Lucky's manufacturing plants, warehouses and transportation system coupled with further efficiencies and synergies will result in approximately $50 million in annual shelf price reductions to California consumers. *Id.* Edgar H. Grubb, senior vice president and chief financial officer of Lucky, stated that efficiencies resulting from the combination of Lucky and Alpha Beta will generate annual cost savings of at least $78.1 million. Grubb Decl. ¶ 6. The Supreme Court has clearly rejected this efficiency argument in *Philadelphia National Bank*, 374 U.S. at 370, 83 S.Ct. at 1745, and the Ninth Circuit reiterated the rejection in *RSR Corp.*, 602 F.2d at 1325. In *RSR*, the court stated, "RSR argues that the merger can be justified because it allows greater efficiency of operation. This argument has been rejected repeatedly.", *Id.* Moreover, even assuming these efficiency savings do result, the

Court is not convinced that defendants will invariably pass these savings on to consumers. As the State queried, "And, most importantly, is it really true that the new firm can achieve $50 million in savings after servicing the debt they assumed in leverage [sic] this $2.5 billion buy-out?" Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Application for a Preliminary Injunction at 8 ("Pl. Supp. Memo."). The State asserts, to the contrary, that prices will rise since there exists a direct correlation between increased concentration and high prices. Mueller Reply Decl. ¶ 6. The Court concludes that defendants have not met their burden of demonstrating that the statistics do not accurately reflect the probable effect of the proposed merger on competition. *Marine Bancorporation,* 418 U.S. at 631, 94 S.Ct. at 2874-75.

C. Injunctive Relief Under the Clayton Act

[6] Section 16 of the Clayton Act allows any person to sue for injunctive relief against threatened loss or damage by a violation of the antitrust laws. 15 U.S.C. § 26 (1979). Section 16 is designed to stop anticompetitive behavior in its incipiency. The Ninth Circuit in *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.* ("ITT"), 518 F.2d 913, 925 (9th Cir.1975), found that injunctive remedies under § 16 "may be as broad as necessary to ensure that threatened loss or damage does not materialize or that prior violations do not recur." The court futher stated that if the direct injunctive restraint proves too burdensome, then "a possible recourse [for the enjoined party] is to stipulate to divestiture as an alternative." *Id.*

The State requests a preliminary injunction "preventing and restraining [Alpha Beta and Lucky], and all persons acting on their behalf, from taking any action,

either directly or indirectly, in furtherance of the proposed acquisition of Lucky, and requiring Alpha Beta to hold and operate separately all of Lucky's California assets and businesses pending final adjudication of the merits of this action; and ... such injunctive relief, including recission ... as is necessary and appropriate to prevent the effect of the unlawful activities alleged." Complaint at 14. Furthermore, the State seeks to "permanently enjoin [Alpha Beta and Lucky from carrying out any agreement, understanding, or plan, the effect of which would be to combine the supermarket business of [Alpha Beta] and Lucky." *Id.*

Defendants maintain that a permanent injunction is tantamount to divestiture since Alpha Beta and Lucky have already merged and the egg has already been scrambled. This argument, however, contravenes the very purpose of the Federal Trade Commission Agreement to Hold Separate ("Hold Separate Agreement"). According to the Hold Separate Agreement of May 18, 1988, "[Alpha Beta] shall hold separate ... the Lucky California Operation ("California Operation") which consists of 362 grocery stores, inventory, trademarks and trade names, warehouses, distribution and manufacturing facilities and all related property and facilities." Under the Hold Separate Agreement, Alpha Beta is required to:

- assure that the California Operation maintain separate financial and operating books and records;
- prevent any waste or deterioration of the California Operation;
- refrain from replacing any executive of the California Operation except to fill a vacancy;
- assure the maintenance of the California Operation as a viable competitor while allowing the California Operation warehouse, distribution and manufacturing facilities to supply stores operated by Alpha Beta during the pendency of the Hold Separate Agreement;
- refrain from selling or otherwise disposing of the warehouse, distribution or manufacturing facility or any retail grocery stores of the California Operation during the pendency of the Hold Separate Agreement;
- separate purchasing for the Alpha Beta and California Operation so that it is done by each entity for its retail grocery sales.

FTC Hold Separate Agreement, ¶ 3 (a)-(f). The Hold Separate Agreement is still in effect. If the Hold Separate Agreement has meaning, this is *not* a completed merger. Alpha Beta and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities. While defendants maintain that it is "verbal calisthenics"[4] to issue

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[4]The Ninth Circuit, in *ITT* warned against indirect divestiture, enjoining the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation. *ITT*, 518 F.2d at 924. In the next paragraph of the opinion, the court goes on to say that while divestiture is not available, injunctive remedies may be as broad as necessary to ensure that threatened loss or damage does not materialize. *Id.* Unlike the Ninth Circuit cases addressing the issue of the availability of divestiture, the instant case involves a Section 7 attack on a proposed merger which has an FTC hold separate order in place. In *ITT* plaintiff brought suit in 1967 to force the divestiture of subsidiaries defendant had acquired beginning in 1950. *Id.* at 915. *See also Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.1976) (plaintiff sought relief directed to a subsidiary defendant had acquired at least one year before); *Bosse v. Crowell Collier &*

injunctive relief to stop a merger contending that such is tantamount to divestiture, they, nevertheless, ask the Court to perform a linguistic triathalon to understand how a Hold Separate Agreement is equivalent to a completed merger. The Court is unable to make such a leap in reasoning.

1) Whether Plaintiff Has Shown Irreparable Injury

[7] The State, acting in its capacity as *parens patriae* on behalf of its residents, has alleged that Californians will be irreparably harmed if the proposed merger is completed. Lessening of competition, the State maintains, is recognized as precisely the kind of irreparable injury that the interlocutory remedies under the Clayton Act were intended to prevent. TRO Application at 32. Unless restrained, the State submits that defendants will rapidly restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent. *Id.* As the Court stated in *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F.Supp. 1326, 1332 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.1985), prospective relief is a more effective remedy for an unlawful merger than retrospective relief. Moreover, if preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be extremeley difficult, if at all possible, to remedy effectively the unlawful merger. *Id.* If the Court is to make a determination as to whether this merger is anticompetitive, the State is correct in its assertion that the egg must be examined before it becomes an omlette. The Court therefore finds that plaintiff has made an adequate showing of irreparable injury.

MacMillan, 565 F.2d 602, 607 (9th Cir.1977) (plaintiff, former shareholder, sought to recover stock pledged on loan subsequently foreclosed upon).

2) Balancing the Hardships

Defendants argue that if preliminary relief is granted, they will suffer irreparable harm which far outweighs any possible risk that the proposed merger will lessen competition. According to defendants, Alpha Beta already has spent $2.5 billion to acquire Lucky; has sold or entered into contracts to sell substantial assets of Lucky; and has placed its Alpha Beta operations under the control of the Lucky management with the full knowledge of the State. Opp. to Inj. at 12. Furthermore, defendants maintain that the State is guilty of laches for delay in bringing this antitrust suit.

Although the Court agrees that suits of this sort must be filed in a timely manner, the Court finds that the State conducted this investigation as swiftly as was responsibly possible; informed defendants that the State intended to have the procedures contemplated by the Hart-Scott-Rodino Act run their course; and repeatedly warned Alpha Beta that failure by the FTC to remedy the State's antitrust concerns could result in this action. Pl. Supp. Memo. at 8. On May 31, 1988, the FTC tentatively approved the merger. During the public comment period following the tentative approval, the State filed comments urging the FTC to withdraw its tentative consent order for the Lucky/Alpha Beta merger. On August 31, 1988, the FTC gave final approval of Alpha Beta's acquisition of Lucky subject to divestiture of 31 to 37 stores. The State filed suit on September 1, 1988. Defendants claim that injunctive relief must be denied because the State unconscionably delayed by not bringing this action before closing of the agreement between Lucky and Alpha Beta on June 2, 1988. Opp. to Inj. at 4, 30. It does not seem unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval. To require,

however, that they then file their action within a narrow three-day window would be unreasonable. As the First Circuit stated in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 430 (1st Cir.1985):

> [I]t is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated. Unfortunately, the public is also the loser under such an approach as it cannot bring its own suit except through the Justice Department and must rely on adventitious suits of private plaintiffs to maintain competitive conditions.

The Court is persuaded that the harm plaintiff would suffer if the merger is not enjoined far outweighs the harm defendants may suffer as a result of an injunction. The result of this balancing, coupled with the finding of strong likelihood that plaintiff will succeed on the merits, leads to the conclusion that this merger must be enjoined.

III.

CONCLUSION

The overwhelming statistical evidence has demonstrated a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act. This showing has not been rebutted by clear evidence that the proposed merger will not, in fact, substantially lessen competition. Defendants have failed to demonstrate ease of entry into the retail grocery industry. This Court finds that unless defendants are

enjoined, the citizens of California will be substantially and irreparably harmed. While the court in no way belittles the harm defendants may suffer as a result of this preliminary injunction, the Court concludes that it is substantially less than the harm plaintiff would suffer if the merger is not enjoined.

ORDER

That defendants American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc., and their respective successors and assigns, officers, directors, agents, subsidiaries, divisions, groups, affiliates, representatives, employees and attorneys, and all persons acting in concert or participation with them, shall, in accordance with Federal Rule of Civil Procedure 65, during the pendency of this action, be enjoined, restrained and ordered, pursuant to 15 U.S.C. § 26, as follows:

1. Take all steps necessary to operate American Stores Company, Alpha Beta Acquisition Corporation and their subsidiaries, divisions and groups (collectively "American Stores"), independently of the assets and businesses of Lucky Stores, Inc. ("Lucky") in the State of California.

2. Refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988, other than in the ordinary course of business, and shall refrain from taking any further steps to merge or integrate the assets and businesses of American Stores' Alpha Beta California operations with those of Lucky's California operations or any further steps to merge or integrate the assets and businesses of Lucky's California operations with those of American Stores' Alpha Beta California operations.

IT IS SO ORDERED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

AMERICAN STORES CO.; ALPHA BETA ACQUISITION CORP.; LUCKY STORES, INC.
Defendants-Appellants.

No. 88-6467

D.C. No. CV-88-5331

ORDER DENYING REHEARING

Appeal from the United States District Court
for the Central District of California

Before: WALLACE, POOLE, AND O'SCANNLAIN,
Circuit Judges.

The panel as constituted above has voted to deny the petition for hearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On August 10, 1989, I served the within Petition For Writ of Certiorari in re: John K. Van De Kamp vs. American Stores Company, Alpha Beta Stores, Inc., Lucky Stores, Inc., in the Supreme Court of the United States, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Frank Rothman, Esq.
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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 10, 1989, at Los Angeles, California.

Gabriel M. Lopez

GABRIEL M. LOPEZ

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-258

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

v.

AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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28 pp

QUESTION PRESENTED

Whether Section 16 of the Clayton Act permits a non-federal plaintiff, who has neglected to seek a preliminary injunction blocking a proposed merger, nonetheless to obtain an injunction requiring divestiture or dissolution after the merger has been consummated.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

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* The following information is provided pursuant to Rule 28.1: Respondent Lucky Stores, Inc. is a wholly-owned subsidiary of Alpha Beta Co., which in turn is a wholly-owned subsidiary of Alpha Beta Stores, Inc., which in turn is a wholly-owned subsidiary of respondent American Stores Co. All of the subsidiaries of Lucky Stores, Inc. are wholly owned. Respondent Alpha Beta Acquisition Corp., which was formerly a wholly-owned subsidiary of Alpha Beta Co., was merged into respondent Lucky Stores, Inc. on June 9, 1989. Respondent American Stores Co. has no subsidiaries or affiliates other than wholly-owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-258

STATE OF CALIFORNIA,
Petitioner,

v.

AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

American Stores Co. ("American"), Alpha Beta Acquisition Corp. ("Alpha Beta"), and Lucky Stores, Inc. ("Lucky") hereby oppose the petition for a writ of certiorari filed by the State of California.

STATEMENT

1. American is a nationwide grocery retailer, which, prior to June 1988, owned and operated 252 "Alpha Beta" and "Skaggs Alpha Beta" retail grocery stores in

California. On March 21, 1988, American announced a $2.5 billion tender offer for the outstanding shares of another nationwide grocery chain—Lucky Stores—which at that time operated 340 "Lucky Stores" and "Lucky Food Basket" stores in California. American's purpose in acquiring Lucky was to bring its Alpha Beta stores under the Lucky banner and to obtain the substantial cost-saving efficiencies that integration of the two chains would provide. American estimated that this integration would produce shelf price reductions to consumers of $50 million annually.

Immediately after its announcement, American began supplying information to the Federal Trade Commission (FTC) under Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the FTC's Hart-Scott-Rodino Act ("HSR Act") regulations, 16 C.F.R. § 801 *et seq.* On May 31, 1988, after protracted negotiations with the FTC, American entered into a comprehensive consent order in which it agreed, among other things, to substantial divestitures (including 37 stores in California), disposal of its Midwest assets and a ten-year ban on future acquisitions. The FTC, for its part, agreed not to challenge the merger provided all of the conditions of the consent decree were satisfied. On June 9, 1988, American completed its purchase of all of Lucky's outstanding shares. The FTC gave final approval to the consent agreement on August 31, 1988, after review of public comments filed by the California Attorney General ("CAG") and others during a 60-day public comment period.

During this entire period, American also cooperated fully with the CAG, who had begun his own antitrust investigation. Among other things, American furnished the CAG all the California documents and information it had given to the FTC and kept the CAG fully informed of the status of the FTC proceedings. Despite several requests, the CAG declined to inform American of its enforcement intentions. Declaration of Stephen Axinn,

¶ 14 (ER 596).[1] However, nearly three months after American completed the FTC-approved merger by paying $2.5 billion to Lucky shareholders, and five and a half months after the beginning of the tender offer, the CAG commenced an antitrust action in the United States District Court for the Central District of California. The suit, which was brought under Section 16 of the Clayton Act (15 U.S.C. § 26), sought to require American to divest itself of its newly-acquired Lucky stores located in California.

2. After granting the CAG's motion for a temporary restraining order on September 7, 1988, the district court held a hearing (based entirely upon written testimony) to determine whether a preliminary injunction should issue. Respondents presented extensive evidence that their grocery retailers faced substantial competition from "mom and pop" retail grocery stores, convenience food stores, warehouse food stores and other grocery vendors in addition to other large supermarkets. Respondents also proposed as relevant geographic markets 14 individual Metropolitan Statistical Areas ("MSAs"), as defined by the Office of Management and Budget.[2] Based upon these product and geographic market definitions, respondents demonstrated that the combined American/Lucky grocery chains had a market share averaging approximately 19 percent in these 14 markets, *before* divestiture of the 37 stores respondents were required to sell under their agreement with the FTC. Second Declaration of Peter Max, Exhibit 5 (ER 114-28). Respondents also presented extensive evidence showing that entry into the grocery retailing business is easy and that such entry would occur

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[1] Citations to the Excerpts of Record filed in the court of appeals will be referred to throughout by the abbreviation "ER."

[2] These included Los Angeles, Santa Barbara, Anaheim, Bakersfield, Oxnard/Ventura, Riverside/San Bernardino, San Diego, Oakland, Monterey/Salina, San Francisco, San Jose, Santa Cruz, Santa Rosa, and Vallejo/Napa.

swiftly if any grocery chain attempted to raise its prices above competitive levels. Pet. App. A13-A14.

For purposes of its decision, the district court accepted respondents' definition of the relevant geographic markets. Pet. App. B11. However, it adopted the CAG's definition of the relevant product market, which included *only* large, full-line "supermarkets" that operated in more than 10,000 square feet of building space. *Id.* at B10. This definition was based solely upon the written testimony of two economists, one of whom had never reviewed any of the market-specific documents submitted to the CAG. Marion Declaration at 4 (ER 994). Even under this definition of the market, however, and prior to the divestiture required by the FTC, the market share of the combined American/Lucky chain was relatively small, averaging just 24 percent over the 14 geographic markets accepted by the court. *Id.* B12.

Nonetheless, and largely on the basis of the Justice Department's merger guidelines (which the FTC had presumably applied in *approving* the merger),[3] the district court held that the statistical evidence created a presumption that increased concentration created by the merger would substantially lessen competition. Pet. App. B12-B14. Concluding that respondents' evidence as to ease of entry was insufficient to rebut this presumption, the court held that the CAG had established a likelihood of prevailing on the merits. *Id.* at B17-B19. The court also concluded that, because the CAG had shown the possibility of an adverse effect on competition, the CAG had made an "adequate" showing of irreparable injury justifying preliminary injunctive relief. *Id.* at B22.[4]

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[3] The FTC uses the Justice Department guidelines in evaluating horizontal mergers subject to its jurisdiction. See 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, Special Supp., June 17, 1982, S-12 (FTC statement on Justice Department guidelines).

[4] The court made no finding, however, that petitioner would suffer irreparable harm in the absence of divestiture. Pet. App. B22.

Accordingly, the district court entered a preliminary injunction on September 29, 1988. Although Alpha Beta and Lucky already had merged, the court imposed affirmative relief in the form of an order requiring respondents to "take all steps necessary to operate" American and Alpha Beta "independently of the assets and businesses" of Lucky in the State of California. Pet. App. B25. In addition, the injunction required respondents to "refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988," and to "refrain from taking any further steps" to merge or integrate the business operations of Lucky and Alpha Beta. *Id.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A21. Emphasizing that its review of the district court's preliminary injunction order was limited to a determination whether the district court had abused its discretion, the court of appeals declined to disturb the district court's preliminary findings as to the likelihood of success and irreparable injury. *Id* at A7-A9. However, after discussing respondents' evidence as to the relevant product market, the court of appeals stated:

> Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion . . . . Indeed, after all evidence is presented at trial, the fact finder may come to a different view of the market. Pet. App. A10.

Similarly, the court of appeals stated that respondents had made "a compelling case for easy entry into the market." *Id.* at A13.

Although it declined to disturb the district court's preliminary factual findings, the court of appeals held that the district court had misapprehended both the law of divestiture and the law of corporate mergers, and for that reason had abused its discretion in entering so sweeping an injunction. The court reiterated its 14-year-old

rule that, unlike a suit brought by the United States under Section 15 of the Clayton Act (15 U.S.C. § 25), a suit brought by a non-federal plaintiff under Section 16 of the Clayton Act may not seek direct or indirect divestiture. Pet. App. A17-A18. This rule, which is firmly grounded in the language, structure and legislative history of the Clayton Act, was established by the Ninth Circuit in *IT&T Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (*IT&T*), and has been followed by that court ever since. See *Bosse* v. *Crowell Collier & MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977) (*Bosse*); *Calnetics Corp.* v. *Volkswagen of America*, 532 F.2d 674, 692 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976) (*Calnetics*). In applying the rule to this case, the court reasoned that because, under Delaware law, the merger had already been consummated prior to the issuance of the injunction, the injunction constituted an improper divestiture order:

> The preliminary injunction in this case prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors. In other words, these stores must operate as if Lucky had never been acquired by American Stores at all. Such an injunction requires indirect divestiture. See *IT&T*, 518 F.2d at 924. Pet. App. A19.

The court then concluded that, inasmuch as the district court lacked authority to issue a permanent order requiring divestiture, it could not issue a preliminary injunction granting that relief. *Id.* at A20. The court also held, however, that petitioner could seek other, less drastic, injunctive relief on remand, and that the district court would be "free to consider granting such relief." *Id.*

Finally, the court of appeals rejected petitioner's argument that denying it the ability to obtain divestiture would make it difficult or impossible to obtain meaningful relief in merger cases. The court stated:

> We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice. Pet. App. A20-A21.[5]

ARGUMENT

The sole question presented by the petition is whether a district court has authority, in a suit by a non-federal plaintiff under Section 16 of the Clayton Act, to enter an injunction undoing an already-consummated merger or acquisition.[6] Even if this question were otherwise worthy of review by this Court (which it is not), this case, in its present interlocutory posture, is not an appropriate vehicle in which to address that issue. To respondents' knowledge, this Court has never granted review of an interlocutory order in circumstances in which (a) resolution of the issue presented in the petition would not dispose of the litigation no matter which party prevailed and (b) the issue could be raised by the losing party and decided by the Court after a final judgment has been entered. Inasmuch as this case will return to the district court for a trial on the merits regardless of the outcome in this Court, granting the petition at this stage of the litigation would be wholly unprecedented and wasteful of this Court's scarce resources.

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[5] Subsequently, the court of appeals unanimously denied rehearing, and rehearing en banc was denied without a single judge calling for a vote. Pet. App. C1. Justice O'Connor entered an order granting a stay on August 21, 1989, which was modified to require the CAG to post an adequate bond on August 22, 1989.

[6] The petition also lists a second question, which begins by asking "[w]hether the Court of Appeals erred by reversing [the] District Court's preliminary injunction." Pet. i. That question, however, is not separately addressed in the body of the petition. Moreover, to the extent that question differs from the first question ("Whether divestiture is a form of 'injunctive relief' under section 16 of the Clayton Act," *ibid.*), it is obviously too fact-bound to be worthy of the Court's attention.

Moreover, the question presented does not warrant review, both because it was decided correctly below and because it arises only in the rare circumstance in which (a) federal authorities determine that divestiture is unwarranted after reviewing the merger pursuant the Hart-Scott-Rodino Act's premerger notification procedures; *and* (b) a non-federal plaintiff neglects to challenge the merger or acquisition until after it is consummated. Thus, although the decision below appears inconsistent with one decision of the First Circuit, this disagreement—which has existed in dicta for more than a decade without any apparent adverse consequences to competition nationwide—is unquestionably "tolerable."

1. There is no doubt that the underlying merits of the petitioner's antitrust claims have not yet been adjudicated, and that, as the court of appeals observed, "no final judgment has been entered in this case." Pet. App. A21. All the district court has done so far is to enter a preliminary injunction designed to facilitate the entry of a permanent divestiture order *if* the district court ultimately concludes that (a) the merger at issue violates the Clayton Act, *and* (b) divestiture is the appropriate remedy. Pet. App. A10. The court of appeals, having held that divestiture is unavailable, has merely remanded the case for a redetermination of the appropriate preliminary relief and for a final disposition of the merits. Pet. App. A20. This case, therefore, will inevitably return to the district court for a trial on the merits regardless of this Court's disposition of the petition and, if this Court denies certiorari, petitioner will again be able to present the divestiture issue to this Court by way of a new petition if it prevails at trial. Thus, even if this Court were of the opinion that the issue presented in this case is worthy of review, the proper course, given the interlocutory posture of the case, would be to wait until after the district court has entered a final order on the merits before addressing that issue.

a. Because an issue decided in an interlocutory ruling can be raised again after a final order is entered, this Court has long held that interlocutory orders generally are not reviewable on certiorari. *E.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, *supra*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T.& K.W. R. Co.*, 148 U.S. 372, 384 (1893). The only exception to that rule is when resolution of the issue presented is "*necessary* to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Ibid.* (emphasis added); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986). This case fails to satisfy that standard for two independent reasons.

First, the unifying thread running through the few cases in which this Court has granted review of interlocutory orders is the principle that such action is appropriate only when the issue decided on review clearly could dispose of the litigation if decided in favor of one party. Thus, many of the cases in which this Court has reviewed an interlocutory order involved questions as to the jurisdiction of a federal district court. *E.g.*, *Gulf Oil Corp.* v. *Copp Paving Corp*, 419 U.S. 186, 192-93 (1974); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938); *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949). Other such cases have involved clear-cut and equally dispositive legal questions. *E.g.*, *Firefighters' Local No. 1784* v. *Stotts*, 467 U.S. 561 (1984) (district court's authority to modify consent decree or to invoke decree as authority for injunction). *Estelle* v. *Gamble*, 429 U.S. 97, 115 (1976), *cert. denied*, 434 U.S. 974 (1977) (reinstating district court's dismissal of civil rights claim based upon negligence of prison physicians); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723,

727 (1975) (dispositive securities-law issue); *United States* v. *Nixon*, 418 U.S. 683, 690-92 (1974) (potentially dispositive claim of executive privilege); *United States* v. *General Motors*, 323 U.S. 373, 377 (1945) (potentially dispositive damages issue after damages trial); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403 (1916) (reviewing trademark claim underlying temporary injunction); *Forsyth* v. *Hammond*, 166 U.S. 506 (1897) (reviewing merits of lower court decision dismissing action to restrain collection of tax); *American Construction Co.* 148 U.S. at 382 (petitioner's position, if sustained, would render decision below "wholly void"). Still others arose in circumstances such that a refusal to grant interlocutory review would render the case moot. *E.g.*, *E.I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917) (reinstating preliminary injunction enjoining disclosure of trade secrets). Finally, this Court has granted review of a number of interlocutory court of appeals decisions reversing or vacating final district court judgments. *E.g.*, *Spiller* v. *Atchison, T. & S.F. R. Co.*, 253 U.S. 117, 121-22 (1920) (final district court decision adjudicating liability under agency's reparation order); *Gay* v. *Ruff*, 292 U.S. 25, 27 (1934) (final district court decision dismissing for want of prosecution).

But, regardless of the circumstances, in every case (of which respondents are aware) in which this Court has granted review of an interlocutory order, the issue presented was an issue as to which a decision in favor of at least one of the parties would, as a legal or practical matter, cut off further litigation with respect to that particular subject matter.[7] And, except for cases involv-

[7] Even in cases in which a particular order has been deemed final under the "collateral order" doctrine, the issue presented is always at least potentially dispositive of the collateral matter at issue. See, *e.g.*, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (availability of security pending disposition of shareholder directive action); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-58 (1964) (potentially dispositive question of liability as

ing the jurisdiction of the courts of appeals over interlocutory district court orders (and in which the issue presented therefore could not be addressed in a later proceeding),[8] *every* such case has presented an issue that was potentially dispositive of the entire litigation.

That clearly is not true in this case. The question presented concerns the district court's authority to impose *one* of the remedies sought by the petitioner below, not the court's jurisdiction over—or the merits of—petitioner's antitrust claims. See Pet. App. A20 (remanding for consideration of other remedies). Nor is the issue otherwise dispositive of the subject matter—*i.e.*, the relief to which petitioner is entitled—much less the entire litigation: Whether this Court decides the divestiture issue

to claims of some plaintiffs); *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (availability of injunction barring public parade); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (potentially dispositive claim of executive immunity from suit); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) (availability of jury trial); *Greene* v. *United States*, 376 U.S. 149, 153 n. 5 (1964) (propriety of lower court's exhaustion requirement). This case, however, clearly does not fit within the collateral order doctrine because, as discussed in the text (*infra* p. 12), the court of appeals' ruling as to the availability of divestiture is not "effectively unreviewable on appeal from a final judgment." *Flanagan* v. *United States*, 465 U.S. 259 (1984) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

[8] *E.g.*, *DiBella* v. *United States*, 369 U.S. 121, 122-23 (1962) (appealability of district court decision on preindictment motion to suppress evidence); *Flanagan* v. *United States*, 465 U.S. 259 (1984) (appealability of district court decision on pretrial motion to disqualify counsel); *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (appealability of pretrial motion claiming prosecutorial vindictiveness). Although (unlike the other cases discussed in the text), the jurisdictional issues in those cases have not been potentially dispositive of the entire litigation, they have, of course, been dispositive of the litigation in the court of appeals. In addition, and unlike the situation presented in this case (see *infra* p. 12), refusal to grant review at an interlocutory stage in those cases would have meant that the jurisdictional issues presented would never be addressed by this Court.

in favor of petitioner or respondents, the parties will have to return to the district court for a trial on the merits of petitioner's antitrust claims and a final determination of the appropriate remedy. Moreover, if petitioner prevails on the merits, it will be able to present the divestiture issue in a new petition for certiorari, since it is well established that this Court may reach back and decide "all of the substantial federal questions determined in the earlier stages of the litigation." *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)); see also *Scott* v. *United States*, 436 U.S. 128 (1978) (same); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257 (same); *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941) (same). Granting the petition at this stage of the litigation, therefore, would be an unprecedented step as well as an unnecessary expenditure of this Court's resources.

Second, in any event, it is obvious that resolution of the issue presented is not in any sense "necessary" or "fundamental" to the further conduct of the case. See *American Construction Co. supra*, 148 U.S. at 381; *United States* v. *General Motors*, *supra*, 323 U.S. at 377. If, after a full trial, the district court determines that American's acquisition of Lucky, as modified by the consent order issued by the FTC, does not violate Section 7 of the Clayton Act, the availability of divestiture will be irrelevant.[9] The same will be true if the district court concludes, after a full trial on the issue, that divestiture is not the appropriate remedy. As the petitioner conceded before the court below:

> Whether or not the *IT&T* ruling is controlling in this case is a separate question, which may or may not have to be reached, depending upon the availability, following a trial, of other effective forms of relief. Supp. Brief of Plaintiff-Appellee at 15.

[9] Moreover, the decision of the court of appeals below casts substantial doubt on the district court's analysis of the merits, particularly with respect to market share and barriers to entry. See Pet. App. A10, A13.

Petitioner's doubts about its ability to obtain a permament divestiture order after trial are well founded, for courts generally will order such a drastic remedy only when other relief is inadequate. *E.g.*, *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962); *Credit Bureau Report, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780, 798 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *United States* v. *Reed Roller Bit Co.*, 274 F. Supp. 573 (W.D. Okla. 1967). Moreover, petitioner's claims that the district court will be unable to provide an adequate remedy without employing divestiture are wholly speculative: It is not at all clear that narrowly tailored prohibitions against particular activities by the merged entities will be inadequate to eliminate any adverse competitive effects the district court might identify at trial.

If, however, petitioner prevails on the merits below and still believes that divestiture is the only adequate remedy, there is nothing to prevent petitioner from raising the divestiture issue in a subsequent petition for certiorari. See *supra*, p. 12. For that reason, resolution at this time of the issue presented is by no means "necessary" to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.*, *supra*, 148 U.S. at 384.

b. Apparently recognizing this fundamental difficulty, petitioner argues that immediate review is nonetheless essential because of the district court's alleged "finding" that an integration of the Alpha Beta and Lucky supermarket chains would cause irreparable harm by "disabling" one of those chains from operating independently in the future. Pet. 19. This argument is misguided for three reasons.

First, assuming the petitioner's argument is factually correct, it is legally irrelevant. Petitioner does not argue

that an integration of Lucky and Alpha Beta will moot the divestiture issue by making it impossible for the district court to order that relief if this Court (after a second petition for certiorari) ultimately decides the issue in petitioner's favor. Much less does petitioner claim what would be necessary for this case to fall within this Court's precedents, namely, that such an integration will moot the entire case. See *supra* p 10. Rather, petitioner's contention appears to be that a permanent divestiture issued without the benefit of a preliminary divestiture would be somehow less "effective" (Pet. 19). But that allegation, even if true, does not establish that a decision on the question presented in the petition could dispose of the litigation or of the question as to the ultimate propriety of a divestiture remedy.

Nor can petitioner's alleged harm properly be characterized as "extraordinary," as required by *American Construction* and its progeny. Finality requirements frequently impose substantial burdens on litigants: An antitrust plaintiff alleging an ongoing pattern of predatory pricing, for example, might be forced out of business as a result of a district court's erroneous order refusing to grant summary judgment prior to a lengthy trial. But that harm is not deemed sufficiently "extraordinary" to permit immediate review of a denial of summary judgment. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976). *A fortiori*, there is nothing extraordinary about the diminution in the "effectiveness" of the ultimate relief that petitioner claims will result from a denial of its petition. In short, petitioner's litigant-specific concern is no reason for this Court to depart from its usual practice of denying review of interlocutory orders.

Second, petitioner's argument rests upon a mischaracterization of the district court's opinion. Contrary to petitioner's assertion, the district court nowhere made a finding that integration of the two grocery chains would

"disable" one of them from subsequent independent operation; the passage quoted by petitioner (Pet. 19) appears in the district court's summary of the *petitioner's* contentions (see Pet. B22), not in the court's preliminary factual findings. As the court of appeals observed, "[t]he district court decided that the irreparable harm that would result absent an injunction is the lessening of competition'" (Pet. App. A16) not any "disabling" of one of the two grocery chains.[10]

Third, petitioner's argument ignores the many cases in which divestiture has been ordered long after full integration of the merging firms. One such case is particularly analogous: In *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), this Court required divestiture of a major California grocery chain years after the merger had been consummated and the assets, management teams and businesses of the merging chains had been intermingled. See also, *e.g.*, *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (ordering divestiture); *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968) (reversing and remanding to district court to reconsider government's divestiture request). Obviously, the fact that merging firms have already been integrated in no way deprives the district court of authority to order divestiture if it can make the necessary findings supported by the record.

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[10] Petitioner also attempts to assert this alleged "lessening of competition" as an independent reason for ignoring the interlocutory nature of the order under review. See Pet. 22 ("Even between the time this case is remanded to the District Court and actually tried, substantial irreparable harm is likely to be inflicted on California's consumers"). Like the alleged injury discussed in the text, however, this injury (if it exists) is certainly not "extraordinary" (since it is no different from the injury generally sustained by a plaintiff during the pendency of a meritorious antitrust case), and it does not make the issue presented potentially dispositive of the litigation.

In sum, petitioner has presented no adequate reason for ignoring this Court's usual practice of denying petitions for review of interlocutory orders. The petition should be denied for that reason alone.

2. The only issue raised in the petition is whether divestiture is an available *post*-merger remedy under Section 16 of the Clayton Act. See *supra* n. 6. Regardless of any disagreement among the lower courts on that issue, it is not of sufficient practical importance to warrant review by this Court because (1) the well-recognized right of any plaintiff to obtain a *pre*-merger injunction, together with (2) the pre-merger notification requirements of the Hart-Scott-Rodino Act, has made post-merger divestiture a virtual dinosaur.

It is well established—and petitioner does not dispute —that *any* plaintiff can seek to enjoin a merger or acquisition *before* it has been consummated. The federal government, which by statute has principal responsibility for enforcing the antitrust laws, can do so under Section 15 of the Clayton Act. 15 U.S.C. § 25. Other plaintiffs, including the States, can do so under Section 16. 15 U.S.C. § 26. Non-federal plaintiffs, moreover, frequently succeed in blocking mergers and acquisitions before they occur. *E.g., Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir. 1985), *cert. dismissed*, 469 U.S. 1200 (1985); *Grumman Corp.* v. *LTV Corp.*, 665 F.2d 10 (2d Cir. 1981); *Gulf & Western Industries* v. *Great A&P Tea Co.*, 476 F.2d 687 (2d Cir. 1973; *American Crystal Sugar Co.* v *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *Muskegon Piston Ring Co.* v. *Gulf & Western Industries*, 328 F.2d 830 (6th Cir. 1964); *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D.Mich. 1960), *aff'd per curiam*, 280 F.2d 747 (6th Cir. 1960).

Moreover, the pre-merger notification procedures of the Hart-Scott-Rodino Act ("HSR Act") (15 U.S.C. § 18a) provide both federal enforcement authorities and private plaintiffs ample time to challenge a merger or acquisition before it has become a *fait accompli;* indeed, that was one of the HSR Act's primary purposes. See, *e.g.*, S. Rep. No. 803, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2637; S. Axinn, B. Fogg, N. Stoll, & B. Pragen, *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act* 1-5 (1988). The Act and regulations promulgated thereunder (16 C.F.R. § 801 *et seq.*)—which apply to virtually all mergers of any consequence (see 15 U.S.C. § 18a(a)) —require that parties to a merger or acquisition wait a minimum of 30 days (15 days in the case of a cash tender offer) after they notify the FTC of their intention to merge with, acquire or be acquired by another company. 15 U.S.C. § 18a(b). Issuance of a request for additional information, moreover, will delay expiration of the waiting period for an additional 20 days (10 days in the case of a cash tender offer). *Id.* In addition (and more important for purposes of this case), negotiations with federal authorities often prolong that period by several weeks. Indeed, in this case, the petitioner had a total of 79 days from the beginning of the waiting period to the completion of the merger.

Particularly in light of the business exigencies frequently associated with mergers and acquisitions (including fast-paced hostile tender offers, competing bids and wildly fluctuating stock prices), the HSR procedures provide ample time for anyone with a serious interest in the competitive effects of a particular merger or acquisition to compile the evidence needed to seek a temporary restraining order and a preliminary injunction.[11] Indeed,

[11] As illustrated by the present case, moreover, other parties may participate to some degree in the federal government's deliberations, and may thereby obtain important evidence concerning the merger from the federal government.

private plaintiffs routinely sue to enjoin mergers while the HSR periods are running. *E.g.*, *Phototron Corp.* v. *Eastman Kodak Co.*, 842 F.2d 95 (5th Cir. 1988), *cert. denied*, 108 S.Ct. 1996 (1988); *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co., supra; R.C. Bigelow, Inc.* v. *Unilever N.V.*, 689 F. Supp. 76 (D. Conn. 1988); *McCaw Personal Communications, Inc.* v. *Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986). In short, the HSR pre-merger notification procedures have rendered post-merger injunctions unnecessary and obsolete.

As this case illustrates, the only situation in which the issue presented in the petition can arise is the rare situation in which (a) all other interested parties—including federal enforcement authorities reviewing the transaction under the HSR procedures—have determined not to challenge the transaction, and (b) a non-federal plaintiff has failed to challenge the transaction before it is completed, but later chooses to file suit. That, of course, is exactly what happened here. The FTC approved the merger after the parties agreed to divest a number of their stores, including many in California. However, the CAG, which, in the court of appeals' words, "could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed," nonetheless "chose not to do so." Pet. App. A20-21.[12]

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[12] In an effort to avoid the force of the Ninth Circuit's holding on this point, petitioner mistakenly relies upon the district court's statement that petitioner conducted its *investigation* of the instant merger "as swiftly as was responsibly possible." Pet. 15. The district court, however, made no reference to the filing of the CAG's lawsuit and request for a preliminary injunction, which the Ninth Circuit obviously believed to be tardy. Indeed, given that the Ninth Circuit's non-divestiture rule has been clearly established for almost fifteen years, the CAG's failure to initiate a lawsuit and seek a preliminary injunction during the 79 days between the commencement of its investigation and the consummation of the merger was wholly unjustified.

Contrary to the CAG's assertions (Pet. 16), moreover, initiation of its own lawsuit would not have required the CAG to "disregard" the FTC's review procedures. The CAG could easily have pursued both avenues simultaneously.

Thus, as long as a non-federal plaintiff exercises reasonable diligence in challenging a merger or acquisition it believes to be unlawful, the issue presented in the petition will never arise. There is no reason to believe that petitioner—or any other non-federal party—will fail to exercise such diligence in the future, particularly where, as in the Ninth Circuit, the law is clear that divestiture will not be available as a post-merger remedy. The limited tension between the holdings of the First and the Ninth Circuits,[13] therefore, is simply not of sufficient import to require resolution by this Court.

3. In any event, the Ninth Circuit's long-standing interpretation of Section 16 is demonstrably correct. Section 15 of the Clayton Act (15 U.S.C. § 25) grants *federal* enforcement authorities general authority to commence any "proceeding in equity" to remedy a violation of the antitrust laws, and it is well established that this provision authorizes the United States to sue for divestiture. *E.g.*, *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961). Section 16, however, is narrower in scope, authorizing non-federal plaintiffs to sue only for "injunctive relief." 15 U.S.C. § 26.

As the Ninth Circuit correctly held in *IT&T* and subsequent decisions (including the decision below), "injunctive relief" under Section 16 is by no means synonymous

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[13] The First Circuit's decision in *CIA Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), is the only circuit court decision arguably in conflict with the Ninth Circuit's long-standing no-divestiture rule. The Third Circuit's discussion of the divestiture issue in *NBO Industries Treadway Cos.* v. *Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975), *rev'd on other grounds*, 429 U.S. 477 (1976), was mere dictum.

with "equitable relief" under Section 15. It is well established in equity jurisprudence—both now and in 1914, when the Clayton Act was passed—that "injunctive relief" is a particular species of equitable relief, separate and distinct from other, well-established equitable remedies such as dissolution or divestiture. *E.g.*, 1 J. Story, *Commentaries on Equity Jurisprudence* 680-82 (13th ed. 1886) (treating dissolution as distinct equitable remedy); J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1316 & n. 7 (1905) (analyzing injunction as distinct category of equitable relief, separate from such equitable remedies as dissolution, receivership, reformation, specific performance, etc.); *Graves* v. *Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924) (L. Hand, J.) (treating injunction and dissolution as distinct equitable remedies). Moreover, the legislative history of Section 16 makes clear Congress's understanding in 1914 that, unlike the Federal Government, non-federal plaintiffs would not be able to seek divestiture under the statute precisely because such a remedy was not considered "injunctive relief." See, *e.g.*, *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63rd Cong., 2d Sess. (1914) ("1914 Hearings") at 842 (statement of committee member that "[w]e did not intend by section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has") (1914), *quoted in IT&T*, 518 F.2d at 922; see also 1914 Hearings at 261, 491-92, 649-50, 842-45, 1372-73 (1914).[14] Given the language, structure and legislative history of Section 16, there is no warrant for petitioner's view that "injunctive relief" should now be construed to include any kind of equitable relief a resourceful antitrust plaintiff might imagine.

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[14] In addition, the legislative history of the Hart-Scott-Rodino Act clearly indicates Congress's understanding that state attorneys general do not have authority to seek divestiture under Section 16. See 122 Cong. Rec. 30,868 (1976) (statement of Rep. Peter Rodino).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In the Supreme Court
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OCTOBER TERM, 1989

STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA
ACQUISITION CORP., AND LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CALIFORNIA'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents American Stores Co., Alpha Beta Acquisition Corp., and Lucky Stores, Inc. ("American") urge this Court to avoid deciding now whether petitioner State of California ("California") is entitled to divestiture under section 16 of the Clayton Act (15 U.S.C. § 26). Instead, American counsels the Court to await a final determination by the lower courts whether an acquisition creating a supermarket chain collecting one out of every four grocery dollars spent by Californians, violates section 7 of the Clayton Act (15 U.S.C. § 18). The District Court found that it almost certainly does and the Court of Appeals has affirmed that finding. (Petition for Certiorari, Appendix ("Pet. App.") A, pp. A6, A11.)

The odyssey in quest of divestiture recommended by American is likely to last well into the next decade. During that time 53 of the 62 relevant geographic markets will be controlled by American and the next-largest chain, who will share over 50% of the grocery sales. (ER 691-95,668-69.) This would culminate a fifteen-year trend toward ever-increasing concentration that has resulted in a 50% increase in the number of markets in California which are highly concentrated even as American would postulate the geographic markets. (ER 35.) This competitive disaster is necessary American says because California citizens reside in the Ninth Circuit.

California respectfully submits that this Court cannot countenance the years of injury the courts below found California consumers would endure or the waste of judicial resources such a course compels. It simply makes no sense to require the parties to conduct a trial in order to present another opportunity to review the no-divestiture rule of the Ninth Circuit that has been repudiated in other circuits and has been virtually unanimously condemned by the commentators. Under principles that have long guided this Court, this case should be heard and resolved now.

I.

THIS CASE MEETS THE COURT'S STANDARDS FOR REVIEW OF INTERLOCUTORY ORDERS

American does not dispute this Court's jurisdiction to review the judgment of the court of appeals overturning a preliminary injunction, a matter for which certiorari clearly lies. (28 U.S.C. § 1254(1).) Rather, it argues this case is unworthy of the Court's attention and does not meet historic standards for interlocutory review. American observes that interlocutory appeals are extraordinary — and proceeds to cite twenty-four cases in which such appeals were heard. (See Opposition, pp. 9-11.) Nothing in those cases suggests California's petition fails to meet the Court's criteria for certiorari.

A. This Court Frequently Reviews Interlocutory Issues Fundamental to Ongoing Litigation or Important to National Antitrust Policy

The Court has been particularly willing to undertake interlocutory review to eliminate barriers to effective private enforcement of the antitrust laws. In *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134 (1968), the Court was presented with another Ninth Circuit decision threatening the effectiveness of private antitrust actions. Despite the District Court proceedings remaining to be conducted under the Court of Appeals' ruling, this Court granted certiorari to review the dismissal of the Sherman Act claims:

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari." (392 U.S. at 136.)

See also *Gulf Oil Corp. v. Copp Paving Corp.*, 419 U.S. 186, 192-93 (1974); *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384, 386 (1968).

B. Resolution of the Divestiture Issue is Essential to the Further Conduct of This Case And Should Be Addressed Now to Avoid Grievous Injury to the Public

The importance of California's petition to national antitrust policy, to this case, and to 28 million citizens of this Nation compels review at this time.

1. The Decision Below "Threaten[s] the Effectiveness of the Private Action as a Vital Means for Enforcing the Antitrust Policy of the United States"

The Ninth Circuit's "no-divestiture" holding is precisely the kind of decision that "seem[s] to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" and is therefore appropriate for interlocutory review. [*Perma Life Mufflers, Inc. v. Intern. Parts Corp., supra*, 392 U.S. 134, 136.)

American agrees that the opinion below renders divestiture unavailable once the parties exchange money and stock but attaches no importance to that fact, declaring "post-merger divestiture a virtual dinosaur." (Opposition, p. 16.) Whatever else must be said of this declaration, it is one which ought to come, if not from Congress, then from this Court. The very claim demonstrates the urgency of immediate review.

American explains that the extinction of post-merger divestiture is the Darwinian result of two forces; (1) availability of pre-merger injunction and (2) the pre- merger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act (HSR) (15 U.S.C. § 18a). Pre-merger HSR review is available only to the federal government and pre-merger relief to the government and industry insiders; it simply does not represent an avenue of effective private enforcement of the antitrust laws.

2. This Case Presents an Issue "Fundamental to the Further Conduct of the Case"

Interlocutory review is most frequent when necessary to resolve an issue "fundamental to the further conduct of the case." *(United States v. General Motors*, 323 U.S. 373 (1945); see also *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 30 (1988).)

American argues that that standard is not met here because liability remains to be established and remedies short of divestiture are to be considered by the trial court. American's advice requires the Court to ignore the fact that a probable violation of section 7 of the Clayton Act was found by the District Court and affirmed by the Court of Appeals. Once such a violation has been found, this Court teaches that divestiture "should always be in the forefront of a court's mind ...." *(United States v. E.I. DuPont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948).)[1]

This Court has always recognized that effective remedies lie at the heart of section 7 enforcement. If this case is to be tried on remand under the Ninth Circuit's no-divestiture rule, what kinds of relief short of divestiture can be considered? Limits on American's growth? Making essential American facilities available to competitors? Regulation of prices? Divestiture will make it unnecessary to answer these questions; the Ninth Circuit has made it essential. There can be no clearer sign that this issue is "fundamental" to the litigation.

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[1] *DuPont* and *Schine* dispose of American's argument, based on decades-old lower-court decisions, that divestiture is a drastic remedy to be ordered only as a last resort. (Opposition, p. 13.)

3. Immediate Review Is "Necessary to Prevent Extraordinary Inconvenience and Embarrassment"

American's preferred formulation of the standard for interlocutory review is whether an immediate determination of an issue is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." (Opposition, pp. 9, 12, 13, 14, citing *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1893).) It is instructive to compare the course American proposes to the *American Construction* standard.

American would have this Court decline review and remand for trial in the District Court. It would likely take until the middle of the next decade, at the soonest, for this case to be tried, appealed, reviewed by the Court, remanded, and ultimately decided.[2] The "inconvenience" is manifest — not merely to the parties but to 28 million Californians who would have suffered the loss of competition and attendant higher prices in this most fundamental of markets for six years. The "embarrassment" to the system of justice that cannot resolve so pressing an issue in less than seven years is obvious. A trial of the remedy issues without consideration of divestiture — and the attendant waste of judicial, law-enforcement, and private resources — is also an appropriate source of "embarrassment." One can scarcely imagine a case more clearly qualifying under the *American Construction* test.

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[2] Assuming discovery started this month, trial could not begin until 1990. Final judgment is unlikely before early 1991. An appeal taking the same time as this expedited appeal would produce a decision sometime in 1992. This Court might rule on California's petition for certiorari in time for the case to be heard in its 1992-93 term. If California prevailed, sometime in mid-1993 the case would return to the District Court for a trial on remedy. The appellate process would then start over. Final disposition of this case could not occur before the Summer 1995 recess, at which point — seven years after the merger — American would be required to revive a competitive entity dead for six years.

C. The Cases Do Not Support the Additional Conditions American Would Impose on Interlocutory Certiorari

American urges a previously undiscovered "unifying thread" it claims joins the jurisprudence on interlocutory certiorari: such review, according to respondents, "is appropriate only when the issue [to be] decided on review clearly could dispose of the litigation if decided in favor of one party." (Opposition, p. 9.) American offers no policy reason for this Court to so limit its purview, and the cases cited by American dispute any such limitation.

This Court has repeatedly entertained cases where courts of appeals had ruled in favor of defendants on certain claims and remanded for determination of other claims. (*E.g., Gulf Oil Corp. v. Copp Paving Corp., supra,* 419 U.S. 186; *Perma Life Mufflers, Inc. v. Intern. Parts Corp., supra,* 392 U.S. 137; *Case-Swayne Co. v. Sunkist Growers, supra,* 389 U.S. 384.) In other cases, the Court has accepted review despite the fact that the cause was to proceed to trial with other parties. (*E.g., Estelle v. Gamble,* 429 U.S. 97 (1976) (dismissing civil rights action against prison medical director but not addressing claims against other defendants); *Gillespie v. United States Steel Corp., supra,* 379 U.S. 148 (while petitioners' claims were not "formally severable" from the others, they would be heard because resolution was fundamental to the case).)

And the Court has addressed issues of remedy even though the determination would not end the litigation regardless of how the court ruled, just as American claims a decision on California's right to divestiture will not resolve this litigation. (*Carey v. Piphus,* 435 U.S. 247 (1978); *United States v. General Motors, supra,* 323 U.S. 373; *Beacon Theatres v. Westover,* 359 U.S. 500 (1964).

American's gloss on the jurisprudence of interlocutory appeal is unsupported by the cases. And lacking precedential authority, the theory has little else to commend it.

II.

THE NINTH CIRCUIT'S NO-DIVESTITURE RULE EFFECTIVELY PRECLUDES ENFORCEMENT OF SECTION 7 BY NON-FEDERAL PLAINTIFFS REPRESENTING CONSUMERS

American asserts that resolution of the proper scope of relief under section 16 is unnecessary because the issue will only arise when (1) federal agencies do not bring an enforcement action and (2) "a non-federal plaintiff has failed to challenge the transaction before it is completed". (Opposition, p. 18.)

The first condition will, of course, obtain for the vast majority of the thousands of mergers generating HSR filings each year, only a tiny fraction of which the two federal agencies could possibly challenge. And the second condition is the routine, unavoidable circumstance for non-federal plaintiffs outside the affected industry.

A. The Cases Demonstrate That Pre-Merger Injunction Is Feasible Only for Intra-Industry Plaintiffs and the Federal Government

In its eulogy for post-merger divestiture, American offers the consolation that non-federal plaintiffs can always sue to enjoin a merger before it occurs. (Opposition, p. 16.) It cites nine cases where they did to illustrate the ready availability of such relief. (*Id.,* pp. 16, 18.)

Each of the nine cases involves an intramural altercation between firms in the same industry. American cites fights between beer brewers, sugar manufacturers, tea producers, military aircraft manufacturers, machine-tool makers, photofinishers, communications firms, and, appropriately enough, supermarkets. (Opposition at 16.)

Such intra-industry litigation certainly falls within Congress' statutory scheme of public and private enforcement of the antitrust laws, even when "the true concerns of the 'private attorney general' may be more 'private' than 'attorney general.'" (*Grumman Corp. v. LTV Corp.,* 665 F.2d 10,

11 (2d Cir. 1981).)[3] But conspicuously missing from American's list is a *single* case where private interest was not the driving motive.

For a party to seek an injunction against a merger that threatens competition, that party must secure expert consultants, amass detailed market data, satisfy himself or herself that a meritorious section 7 claim exists, and prepare the papers necessary to present a coherent picture of the market to a district court. The essential ingredients — industry-specific expertise and market data — will always be on hand to players in the market well in advance. Outsiders will have to construct the information from scratch — often impeded by confidentiality claims of those who have the information. For this reason, American can point only to intra-industry cases of pre-merger injunctive actions.

B. This Case Demonstrates The Impossibility of Private Action More Swift Than a Takeover

The present case vividly demonstrates the impossibility of effective private enforcement within the time required by the Ninth Circuit's no-divestiture rule.

American's selective recitation of the history of its takeover of Lucky is calculated to support the claim that California had 79 days in which to seek an injunction (Opposition, p. 17), a figure calculated from American's tender offer on March 21, 1988, to its June 9, 1988, completion of the purchase (*id.*, p. 2). However, it was not until May 23 that it became clear who, if anybody, was going to buy Lucky. (Petition at 4.) That left only a narrow 17 day window for commencing this suit before American completed its acquisition of Lucky's stock.

While California did commence its investigation before the agreement was reached — and throughout the period informed American of its concerns and of the possibility of

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[3]The Court ought not rely on competitors to raise antitrust concerns in horizontal mergers. If a merger increases concentration, it relieves both merging and non-merging firms of competition.

litigation should those concerns not be resolved[4]— private antitrust enforcement cannot be based on the assumption that an interested party will prepare for litigation over every hostile offer raising antitrust concerns.

In large measure, this case is before the Court in its present posture because the Federal Trade Commission allowed American to complete its stock purchase while it was putatively conducting its HSR review. California *was* able to complete its analysis and secure a preliminary injunction in the same time it took the FTC to complete its own assessment of the merger — as demonstrated by the fact that California filed the present case the day after final FTC action.

But the record before the District Court demonstrates the impossibility of securing a preliminary injunction during the narrow pre-merger window created by the FTC allowing purchase of the stock during HSR review. While American characterizes the timing of California's action as a failure to exercise "reasonable diligence" (Opposition, p. 19), the District Court found that petitioner "conducted this investigation as swiftly as was responsibly possible." (Pet. App. B, p. B23.) That court actually saw firsthand the evidence California adduced in support of the preliminary injunction and specifically found that swifter action was not reasonably possible. It is plain from the record that if a lawsuit must be filed and preliminary relief secured before the stock is purchased, non-federal parties outside the industry will simply be unable to bring enforcement actions. Whether the window is seventeen days or seventy-nine, the principle is the same: investors launching takeovers will always be able

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[4]The District Court found that California "informed defendants that the State intended to have the procedures comtemplated by the Hart-Scott-Rodino Act run their course . . . and repeatedly warned [American] that failure by the FTC to remedy the State's antitrust concerns could result in this action." (Pet. App. B, p. B23.) American simply ignores that finding. (Opposition, p. 2.)

to buy stock faster than private parties can prove an antitrust case.

CONCLUSION

A fundamental question of antitrust policy will never be presented to this Court more squarely than it is here: whether the Ninth Circuit correctly held that private parties seeking to enforce section 7 of the Clayton Act must secure an injunction before the stock is acquired or be forever limited to injunctive relief "directed at the symptoms rather than the underlying cause" of the antitrust violation (Pet. App. A, p. A20). California respectfully urges the Court to grant the petition and to reaffirm the vitality of private enforcement of the antitrust laws.

Respectfully submitted,

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STATE OF CALIFORNIA
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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On October 5, 1989, I served the within California's Reply Brief in Support of Petition for a Unit of Certiorari in re; "John K. Van de Kamp vs. American Stores Co., Alpha Beta Acquisition Corp., and Lucky Stores, Inc." in the Supreme Court of the United States. October Term 1988 No. 89-258 on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

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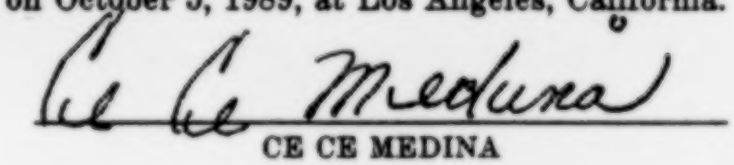

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NO. 88-258

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,

Petitioner,

VS.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

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INTRODUCTION

The States of Alabama, Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of California's Petition for a Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty of enforcing both state and federal antitrust laws, including Section 7 of the Clayton Act. The Amici States play a major role in federal antitrust enforcement. The States were actively protecting our system of free enterprise before the federal government had antitrust enforcement authority. Twenty-one states had adopted their own antitrust statutes by the time the Sherman Act was enacted. *California v. ARC America Corporation*, ____ U.S. ____, 109 S.Ct. 1661, 1665 n.4 (1989). Many of these statutes include explicit provisions requiring them to be construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[1] In other states, local courts have adopted federal precedent to promote uniform law.[2] The Amici

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[1] *See, e.g.*, Tex. Bus. & Com. Code § 15.04 (1989) (to the extent consistent with the purpose of maintaining and promoting economic competition in trade and commerce and to provide the benefits of such competition to consumers in Texas); Wash. Rev. Code § 19.86.920 (1985).

[2] *See, e.g., Minnesota v. Duluth Bd. of Trade*, 107 Minn. 506, 121 N.W. 395 (1909).

States, therefore, have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional intent, this Court's past decisions, and sound public policy.

The Amici States support the State of California's contention that divestiture is a remedy available to private plaintiffs under Section 16 of the Clayton Act. In *California v. American Stores*,[3] the Ninth Circuit held that divestiture is not available as a remedy to California as a private plaintiff. In so holding, the Ninth Circuit weakened antitrust law and perpetuated a split among the circuits.

SUMMARY OF ARGUMENT

American Stores offends public policy and is contrary to the clear intent of Congress. In denying the divestiture remedy to the State of California, the Ninth Circuit draws an untenable distinction between the remedies afforded private and public plaintiffs. The distinction is especially arbitrary when one considers that the so-called "private" plaintiff in this case is a state, representing public rather than private interests.

This Court has not considered the issue of whether divestiture is a remedy available to states and private parties. At the appellate and district court levels, conflicts on the divestiture remedy issue exist in abundance. Because the circuits are in direct conflict on this issue and because of the public policy implications of the *American Stores* decision, this Court should grant the Petition of Certiorari filed herein by the State of California.

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[3]*California v. American Stores Co.*, 872 F.2d 837 (9th Cir. 1989), *petition for cert. filed*, (U.S. August 10, 1989) (No. 89-258).

ARGUMENT

I. THE HOLDING IN *AMERICAN STORES* SEVERELY LIMITS THE EFFICACY OF PRIVATE ENFORCEMENT UNDER THE CLAYTON ACT, CONTRARY TO THE CLEAR INTENT OF CONGRESS.

Section 7 of the Clayton Act prohibits the acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Sections 4 and 16 of the Clayton Act provide for private rights of action. "[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S. Ct. 1562, 1580 (1969).

The Ninth Circuit's decision in *American Stores* severely weakens the right of action granted to private parties under the Clayton Act. In *American Stores*, the Court of Appeals held that "divestiture, whether direct or indirect, is not an available form of relief under Section 16 for a private party such as California." 872 F.2d at 845. Thus, the states and private plaintiffs have been denied the remedy this Court has recognized as "the most important of antitrust remedies." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961). "[Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found." 366 U.S. at 331, 81 S.Ct. at 1253.

Without the remedy of divestiture, the states and private plaintiffs are effectively precluded from enforcing Section 7 of the Clayton Act. Frequently, as

in the *American Stores* case, it is not feasible for a state or private party to file suit before a merger is consummated. The "symptomatic" remedies permitted by the Ninth Circuit in such cases cannot correct the harm produced by illegal mergers.

Congress clearly did not intend such a result when it granted a right of action to private parties. "Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties. . .and to enlist the business public as private attorneys general to aid the government in 'achieving the broad social object of the statute.'" *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 415 (1st Cir. 1985) (citation omitted). The significance Congress placed upon the private plaintiff injunctive remedy is reflected by the following statement made during consideration of the Clayton Act:

> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So. . .the committee, proposed to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. 9270 (daily ed. May 26, 1914) (statement of Rep. Carlin).

As a matter of public policy, private parties play an important role in enabling judicial review of potentially anticompetitive mergers or acquisitions. The federal government alone cannot adequately enforce the Clayton Act. Its resources are limited. Furthermore, prosecutorial discretion allows the federal government to proceed or not proceed at will as it chooses.

> Where the government fails to enforce certain antitrust laws, private actions can assure that violations of these laws are brought before the courts. In this way, private litigation serves to further the development of the antitrust laws. In creating a private right, Congress necessarily intended private parties to play this vital role. Courts should not allow the government agencies alone to determine, through their enforcement policies, the substance of antitrust law.

Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579, 1595 (1986) (footnotes omitted).

State attorneys general play a special role in this enforcement scheme. Many are charged under their respective state laws with the same powers and responsibilities granted by federal law to the Federal Trade Commission ("FTC") and the United States Department of Justice. Additionally, state attorneys general are particularly well suited to investigate and prosecute mergers with predominantly local impact, given their knowledge of local business conditions and their responsibility to the citizens of their states. Congress recognized the special role state attorneys general should play in antitrust enforcement when it

granted the state attorneys general *parens patriae* authority in Section 4C of the Clayton Act, 15 U.S.C. § 15c.

The Ninth Circuit seemed to recognize the difficulty created by its decision but claimed that its holding does not place the states and private plaintiffs in "an untenable position," since suit may be filed before a stock sale has been completed. 872 F.2d 846. States and private plaintiffs, however, do not always have access to the information necessary to analyze mergers before the mergers are completed. For example, state attorneys general are not permitted access to Hart-Scott-Rodino filings directly from the federal government. *Lieberman v. FTC*, 771 F.2d 32, 37-38 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985).[4]

Even if essential information is available, the analysis required to determine whether or not a merger should be challenged is simply too complicated to be accomplished within the narrow "window of opportunity" established by the Ninth Circuit in *American Stores*. As a matter of public policy, antitrust law should not require suit before the time when filing is "responsibly possible." Indeed, the Ninth Circuit's holding often will unfairly force private plaintiffs to weigh the threat of sanctions against the loss of their only effective remedy, divestiture. *See* Fed. R. Civ. P. 11. Moreover, the decision forces private and state plaintiffs to act prior to completion of any federal review process. Cooperation between state and federal

[4]Although many states have the power under their statutory law to obtain documents from the merging parties, *see, e.g.*, Tex. Bus. & Com. Code § 15.10, such pre-complaint discovery power is often too slow in the fast-paced world of mergers. Private parties other than states do not have such subpoena power.

law enforcement authorities should be encouraged by the courts, not discouraged.

The facts in the instant case demonstrate the difficulties created by the Ninth Circuit's decision. The district court found that California had "conducted this investigation as swiftly as was responsibly possible." *American Stores*, 697 F. Supp. 1125, 1135 (C.D. Cal. 1988), *rev'd*, 872 F.2d 837 (9th Cir. 1989), *petition for cert. filed*, (U.S. August 10, 1989) (No. 89-258). The district court also found that California was participating in the "premerger" review procedure established by Hart-Scott-Rodino Act. 697 F. Supp. at 1135. California submitted comments to the FTC analyzing the merger and recommending that the FTC withdraw its proposed consent agreement. *Id.* The district court found that it was not "unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval." *Id.*

The record reveals that the FTC approved the merger in the instant case on August 31, 1988, and California filed suit the next day. *Id.* To accept the Ninth Circuit's assertion that "California could have sued several months earlier and attempted to enjoin the merger", 872 F.2d at 846, one must acknowledge that California would have had to do so without regard for the FTC review. By participating in the FTC review, California was attempting to protect competition for its citizens, while also cooperating with the federal government. The Ninth Circuit's decision prevents such cooperation in the future.

II. *AMERICAN STORES* IRRECONCILABLY CONFLICTS WITH CIRCUIT COURT PRECEDENT, FRUSTRATING THE STATES' ABILITY TO EFFECTIVELY PROTECT THEIR CITIZENS AGAINST THE THREATS POSED BY UNLAWFUL MERGERS.

At the appellate and district court levels, conflicts on the divestiture remedy issue exist in abundance. In *American Stores*, the Ninth Circuit held that divestiture is not a remedy available to the State of California as a private plaintiff. 872 F.2d at 845. The *American Stores* court cited earlier Ninth Circuit precedent holding that "divestiture is not an available remedy in private actions under Section 16 of the Clayton Act." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975); *see also Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 607 (9th Cir. 1977); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). Several other courts have also held that the divestiture remedy is not available to private parties. *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 510 (1984); *Pretz v. Holstein Friesian Ass'n of America*, 698 F. Supp. 1531, 1536-37 (D. Kan. 1988); *Mr. Frank, Inc. v. Waste Management, Inc.*, 591 F. Supp. 859, 865 (N.D. Ill. 1984).

In direct conflict, the United States Court of Appeals for the First Circuit and several other courts have held that the divestiture remedy is available to private plaintiffs under Section 7. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 406, 413-30 (1st Cir. 1985); *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 1989-1 Trade Cas. (CCH)

¶ 68,536 (S.D.N.Y. 1989); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1255-56 (E.D. Pa. 1987); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp 780, 797 (S.D. Tex. 1971), *aff'd on other grounds*, 476 F.2d 989 (5th Cir. 1973).

This Court has not considered the issue of whether divestiture is a remedy available to states and private parties. The Amici States respectfully maintain that California's Petition for Certiorari should be granted to resolve the conflicts which exist among the lower courts. Such a review is now more important than ever. Mergers and acquisitions are taking place at an unprecedented rate, yet the government resources devoted to investigating and prosecuting such mergers have dwindled. The availability of the private plaintiff divestiture remedy is essential to effective Clayton Act enforcement, necessary for sound public policy, and consistent with congressional intent.

CONCLUSION AND PRAYER

For the foregoing reasons, the State of California's Petition for Certiorari should be granted.

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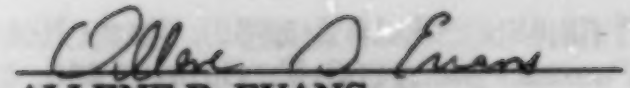

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NO. 89-258 (4)

FILED
SEP 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

VS.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORPORATION, INC., LUCKY STORES, INC.,
Respondents,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI

---

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BEST AVAILABLE COPY

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NO. 89-258

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

The State of California,
by its Attorney General,
John K. Van de Kamp,
Petitioner,

VS.

American Stores Company,
Alpha Beta Acquisition Corporation,
Inc., Lucky Stores, Inc.,
Respondents,

INTRODUCTION

The Center for Public Interest Law of the University of San Diego School of Law ("Center for Public Interest Law"), as *amicus curiae*, respectfully urges this Court to grant the State of California's Petition for a Writ of Certiorari.

INTEREST OF THE CENTER FOR PUBLIC INTEREST LAW

The Center for Public Interest Law is a non-profit, academic public interest law center specializing in antitrust and regulatory issues. It is vitally interested in insuring effective enforcement of state and federal antitrust laws. One of the primary missions of the Center for Public Interest Law is to promote uniform interpretation of the antitrust laws, especially the remedial provisions of Section 16 of the Clayton Act so that all the citizens of this nation may enjoy the benefits Congress intended by protecting competitive markets.

The Center for Public Interest Law supports California's contention that divestiture, like other equitable remedies, should be available to private plaintiffs, as well as the courts, in cases brought under Section 16 of the Clayton Act. The Ninth Circuit's contrary holding in California v. American Stores, 872 F.2d 837 (9th Cir.1989) is unwarranted by any policies underlying the antitrust laws and poses a serious threat to effective antitrust

enforcement.

ARGUMENT

The Ninth Circuit's decision in this case imposes a categorical bar, under Section 16, to the use of the remedy which this Court has long recognized provides the most effective relief against unlawful mergers. (United States v. E.I. Du Pont de Nemours & Co., 336 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961).) In effect, the Ninth Circuit has developed a per se laches defense in all private actions seeking to remedy the harm threatened by completed mergers. While the doctrine of laches has a long history as an equitable defense, (Standard Oil Company of California v. United States, 685 F.2d 1322 (U.S.C.C. 1982); Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Department of Energy, 683 F.2d 1171 (8th Cir. 1982); Goodman v. McDonnell Douglas Corp., 606 F.2d 800 (8th Cir. 1979),) it is a defense uniquely suited to the nice adjustments to varying factual situations which trial courts are

well equipped to make, and which appellate courts should avoid. The Ninth Circuit's decision here turns these principles on their head. The very fact that the Ninth Circuit's "no-divestiture" rule precludes District Courts from weighing factors such as the diligence of the plaintiff, the presence or lack of prejudice to the merging parties and, most importantly, the threat of injury and availability of alternative, effective relief, suggests the inappropriateness of a per se laches defense.

California was well-justified in awaiting final action by the FTC following its review of the materials provided under the Hart-Scott-Rodino Antitrust Improvements Act before initiating this action. (15 U.S.C. 18a.) Indeed, the Ninth Circuit opinion simply ignores the District Court's finding that California acted as swiftly as "responsibly possible." (697 F.Supp. at 1135.) The Ninth Circuit apparently believes that California should have initiated this suit before the FTC reached even a tentative conclusion that the acquisition of Lucky by American Stores was

unlawful, but could be remedied by the consent agreement its staff proposed. (872 F.2d at 846.) It is difficult to conceive of a ruling which suggests a greater waste of scarce judicial resources than one which compels private parties to ignore the H-S-R review procedures and rush to court for fear of losing the possibility of effective relief.

Two additional factors render a categorical laches defense regrettable. First, an unjustified merger is not simply a matter of retroactive loss. An unlawful merger which cannot be unwound will create continuing prospective damage to consumers. It increases concentration, raises prices, limits consumer choice and affects the fluidity of entry and economic opportunity. (Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); United States v. Von's Grocery Company, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).)

Second, a public policy that no merger may be unwound provides a strong incentive to spring them secretly and

quickly. Where the only relief may be prospective, it is to be expected that merger tactics will evolve to make prospective remedies ineffective remedies. Moreover, it is likely that in other substantive areas of antitrust law such as monopolization, the "no-divestiture rule" of the Ninth Circuit will preclude the only effective relief in cases brought under section 16.

Finally, the Center for Public Interest Law would point out the plain wording of section 16 of the Clayton Act. The Ninth Circuit has carved out divestiture as a separate species of injunctive relief, so distinct from other remedies that it should be excepted from the plain language of the statute. It is not. In fact, as the range of cases interpreting section 16 shows, divestiture is but one form of relief on a broad continuum of ameliorating options open to District Courts. This range extends from forced sale of assets and compulsory licensing of patents to requiring the use of assets by third parties at fair prices. (Tasty Baking Co. v. Ralston Purina, Inc., 653 F.Supp. 1250, 1255-56

(E.D.Pa.1987); Joseph Ciccone & Sons v. Eastern Ind., 537 F.Supp. 623, 630 (E.D.Pa.1982).) All forms of injunctive relief disrupt an offending firm's post-violation operations -- that is the purpose of injunctive relief. Whether such disruptions are justified should hinge on the efficacy of the particular remedy to redress the perceived harm, not on arbitrary limitations on the availability of options. If a court cannot right a wrong flowing from a violation of the antitrust laws, how is the grant of equitable powers to the courts of any practical use?

Congress intended the courts to be the arbiters of the behavior which violates the substantive provisions of the antitrust laws. That role should not be delegated solely to the FTC or the Department of Justice. The Ninth Circuit's decision in this case makes the courts hostage to the relief decisions made by the FTC without the benefit of public hearing or judicial review. Our basic competition statutes are too precious to hand the keys to effective relief to a single keeper. Indeed, the very purpose of section 16

of the Clayton Act was to insure that the courts remain open to private parties to serve the high purpose of enforcing the substantive provisions of our national economic charter where the federal government is unable to do so. It would be ironic if the vehicle chosen by the Congress to accomplish that purpose precludes private parties from securing the most effective relief available to prevent the harm which flows naturally from mergers which violate section 7 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Center for Public Interest Law respectfully asks this Court to grant California's Petition for a Writ of Certiorari and reverse the judgment of the Ninth Circuit.

Dated: September 10, 1989

Respectfully submitted,

*Robert C. Fellmeth,
Director
Center for Public Interest Law

By: Robert C. Fellmeth
Robert C. Fellmeth
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this pleading were sent by United States mail addressed to the following counsel for each of the parties to this action:

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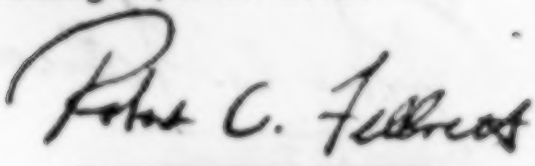

Robert C. Fellmeth

Supreme Court, U.S.
FILED
DEC 1
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-258

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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November 30, 1989

Petition for Certiorari Filed August 10, 1989
Certiorari Granted October 16, 1989

Howse of Los Angeles, Law Printers. (213) 742-6600

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RELEVANT DOCKET ENTRIES
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 88-6467 CONFAT SEALED
EMERG CLOSEDFiled: 10/4/99
State of California v. American Stores Co., et al
Appeal from: Central District of California

- -

Case type information:
1) civil
2) private
3)

- -

Lower court information:

District: 0973-2 : cv-88-5331
presiding judge: David V. Kenyon, Judge
Date Filed: 9/1/88
Date order/judgment: 9/29/88
Date NOA filed: 10/3/88

- -

Fee status: paid

- -

Prior cases:
None
Current cases:
None

Proceedings include all events.
88-6467 State of California v. American Stores Co., et al

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LUCKY STORES, INC.
Defendant - Appellant

Paul T. Denis
(See above)

Frank Rothman, Esq.
(See above)

Stephen M. Axinn
(See above)

Proceedings include all events. CONFAT SEALED
88-6467 State of California v. EMERG CLOSED
American Stores et al

10/4/88 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. (ec)

10/4/88 Filed Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co. emergency motion circuit Rule 27-3 (CIVATT) [88-6467]; served on 10/4/88 [1288558] (ec)

10/4/88 Received Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co.'s brief in 15 copies, and 5 excerpts of record in 2 volumes. (These briefs & excerpts are in sealed envelopes, so we are unable to determine if the brief & excerpt is in correct form in accordance with the Rules. The briefs are premature, as no briefing schedule has been set - referred 1 copy to CIVATT) [88-6467]

10/5/88 Filed certificate of record RT filed in DC 10/3/88. [88-6467] [88-6467] (lu)

10/5/88 Filed joint emergency mtn of American Stores Co., Alpha Beta Acquisition Corp., Lucky Stores, and State of California to expedite appeal under circuit rule 27-3
w/Stipulation regarding the filing of confidential information under seal. (10/5) (CIVATT) [88-6467] [1299702] (dmd)

10/5/88 Received Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co.'s brief in 15 copies of 48 pages. (10/5) (This brief would appear to be the same as the one submitted under seal. It is entitled "Public Record Version Redacted." Also premature, no briefing schedule - referred 1 copy to CIVATT) [88-6467] (jlc)

10/6/88 Recvd ltr dtd 10/5 from Frank Rothman, Esq. of Skadden, Arps, Slate, Meagher & Flom re: Stephen M. Axinn of NY will be arguing and will not be available 10/31 or 11/1. (CIVATT) [88-6467] (dmd)

10/11/88 Filed order (FLETCHER, THOMPSON) Aplts' emergency motion for an expedited hearing is granted in part. The requirement of filing a civil appeals docketing statement is waived and no prebriefing conference shall be conducted. The clerk shall set this matter for oral argument in Pasaden the week of December 5, 1988. Aplts' opening brief and excerpts received on October 4, 1988

and aplts' brief entitled "Public Record Version REdacted" are ordered filed. Aplts' supplemental brief shall be filed by 5:00 p.m. on October 154, 1988. Aple's reply brief, if any, shall be filed by 5:00 p.m. on October 26, 1988. No extensions of time will be allowed. The parties stipulation concerning the filing of documents under seal is construed as a motion to file documents under seal. So construed, the motion is granted. [1299702-1] [88-6467] (jw)

10/11/88 Filed original and 15 copies Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co. opening brief and excerpts of records, previously received. Both the briefs under seal and the "Public Version." [88-6467] (jw)

10/13/88 Filed Appellee State of California emergency motion to file a separate answering brief addressing issues to be raised in the supplemental brief this court directed the aplts to file on 10/14/88; in the alternative, aple requests order waiving the 50 page limit for answering brief. (10/13) (CIVATT) [88-6467] [1325574] (jlc)

10/14/88 Filed order (FLETCHER) aple's emergency motion requesting permission to file a supplemental answering brief is granted. Aple's answering and supplemental briefs shall be filed by 5:00 p.m. 10/21/88. [1325574-1] [88-6467] (jlc)

10/14/88 Filed aplt's supplemental brief (27 pgs) original + 15 copies + 5 supplemental excerpts of record. (10/14) [88-6467] (dmd)

10/21/88 Calendar materials being prepared. [88-6467] (aw)

10/24/88 Received "UNDER SEAL" orig. & 15 copies 15 State of California's brief of 48 pages, and 15 excerpts of record; served on 10/21/88. (Late - sent to calendar with memo for distribution to panel & vault) [88-6467] (jlc)

10/24/88 Received "UNDER SEAL" original and 15 copies Appellee State of California supplemental brief of 19 pages, served on 10/21/88. (Late - sent to calendar unit with memo for distribution to panel & vault) [88-6467] (jlc)

10/26/88 CALENDARED: PASA 12/8/88 10:00 a.m. Courtroom 2 [88-6467] now at 9:00 a.m. (dd)

10/26/88	Received orig. & 15 copies American Stores Co., Alpha Beta Acq. Corp., Lucky Stores, Inc.'s reply brief submitted (UNDER SEAL). (Rec'd only as aple's brief has not been filed) (PANEL & vault) [88-6467] (jlc)
10/31/88	Rec'd 1 copy each of (Public File Version) the aple's brief & supplemental brief received on 10/24. (casefile) [88-6467] (jlc)
10/31/88	Rec'd orig. & 15 (Public Record Version Redated) of aplt's reply brief. (Orig + 1 copy to casefile; discarded remaining copies) [88-6467] (jlc)
11/3/88	Filed order (Deputy Clerk: gb) The "Brief of Pltf-Aple," "Supplemental brief of pltf-aple," and "California Excerpt of record". Received "under seal" by the court on October 24, 1988, are ordered filed. The Reply brief of defts-aplts" received "under seal" by the court on October 26, 1988, is ordered filed. [88-S467] (jw)
11/3/88	Filed original and copies appellee State of California's brief, & suppl. excerpts, previously received. [88-6467] (jw)
11/3/88	Filed original and copies American Stores Co., Alpha Beta Acq. Corp., Lucky Stores, Inc. reply brief, previously received. [88-6467] (jw)

11/21/88	Filed Appellant American Stores Co., Appellant Alpha Beta Acq. Corp., Appellant Lucky Stores, Inc.'s motion for leave to correct brief (Panel) served on 11/17/88 [1458846] [88-6467] (ec)
11/21/88	Received Appellant American Stores Co., Appellant Alpha Beta Acq. Corp., Appellant Lucky Stores, Inc. second supplemental excerpts of record on appeal in 1 volumes. (11/18) (PANEL) (jlc)
12/1/88	Filed order (Deputy Clerk: gb) [1458846-1] The motion for leave to correct brief is granted. [1458846-1] [88-6467] (jw)
12/7/88	Received Appellee State of California letter dated Dec 6, 1988 re: three cases which have not been cited by any of the parties in the briefs already filed . note: The Attorney General's office sent 3 copies directly to the Pasadena office (for panel members) per telephone conversation with Deputy Atty. Gen. Horn [88-6467] (ec)
12/8/88	ARGUED AND SUBMITTED TO: WALLACE, POOLE, O'SCANNLAIN [88-6467] (db)

12/22/88	Filed as of 10/5/88, CERTIFIED RECORD ON APPEAL IN 10 VOLUMES: VOLS. 1-6, CLERK'S PLEADINGS; VOLS. 7-10, R/Ts (ORIGINALS). [88-6467] [88-6467] (jlc)
1/13/89	Opinion clerk to notify atty. Jeff Dahlstrom of decision. (714)661-8332. [88-6467] (mw)
1/25/89	Opinions Clerk will notify Attorney of decision. Jeff Dahstrom (714) 661-8332 [88-6467] (dem)
2/6/89	Received Appellant American Stores Co. letter dated 2/2 re: "requesting the Court's guidance on the proper procedures for bringing before the Court its request to modify the DC's preliminary injunction order...". (PANEL) [88-6467] (jlc)
3/1/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) the parties are free to move the district court for modification of the preliminary injunction. If we are advised that the district court wishes to modify the preliminary injunction, we will consider ordering a limited remand to the district court for that purpose. [88-6467] (jlc)
3/8/89	Opinions clerk will notify attorney of the decision. Louis Trager, Examiner News, 777-7880 San Francisco. [88-6467] (ba)

3/31/89	FILED OPINION (WALLACE, author, POOLE, O'SCANNLAIN), AFFIRMED IN PART, REVERSED, AND REMANDED IN PART. Each side should bear its own costs. FILED AND ENTERED JUDGMENT [88-6467] (jlc)
3/31/89	JS-34 disposition reported. Termination on the merits after oral argument (Affirmed and Reversed) [88-6467] (jlc)
4/3/89	Filed Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co.'s motion to shorten the time of issuance of this court's mandate pursuant to FRAP 41(a).(4/3) (PANEL) [88-6467] [1586000] [88-6467] (jlc)
4/4/89	Received Appellee State of California letter dated 4/4 re: opposing aplt's pending motion. (PANEL) [88-6467] (jlc)
4/6/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) aple State of california is requested to file a response to aplts' motion to shorten the time of issuance of this court's mandate. The response is due to be filed in San Francisco cn or before 4/12/89. [88-6467] (jlc)

4/12/89	Filed Appellee State of California's opposition to aplt's motion to shorten time for issuance of mandate [1587333-1]; served on 4/12/89. (PANEL hand delivered in S.F. & via overnite mail to DFO) [88-6467] (jlc)
4/14/89	[1591265] Filed original and 40 copies Appellee State of California petition for rehearing with suggestion for rehearing en banc. (15 pgs) (4/13) (PANEL & ALL ACTIVE JUDGES) [88-6467] (jlc)
4/20/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) the motion of American Stores Co. to shorten the time of issuance of mandate is denied. [1586000-1] [88-6467] (jlc)
4/25/89	Sent another copy of petition for rehearing en banc to WAN. [88-6467] (jlc)
6/6/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) dfdts-aplts are ordered to file a response to the pltf-aple's petition for rehearing & suggestion for rhrg. en banc within 14 days from the date of this order. [88-6467] (jlc)
6/20/89	Filed orig & 40 Appellants' response in opposition to petition for en banc rehearing. (6/20) (PANEL & ALL ACTIVE JUDGES) [1591265-1] [88-6467] (jlc)

6/26/89	Sent another copy of response of aplt's in opposition to petition for rhrg to ATG [88-6467] (jlc)
7/3/89	Filed order (WALLACE, POOLE, O'SCANNLAIN): the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. [88-6467] (dmd)
7/7/89	Filed Appellee State of California emergency motion to stay the mandate pending petition for writ of cert. (7/6) (PANEL) [88-6467] [1629123] (jlc)
7/7/89	Filed Defendants-Appellants' response in opposition to emnergency motion to stay the mandate pending petition for writ of cert. (7/7) (PANEL) [1629123-1] [88-6467] (jlc)

7/11/89 Filed order (WALLACE, POOLE, O'SCANNLAIN) the motion of California for a stay fo mandate for 30 days to file a petition for writ of certiorari with the USSC is granted, provided that California promptly file a bond or other security pursuant to FRAP 41(b) to reimburse American Stores Company, in the event that certiorari is not granted, for any loss occasioned by the delay of our mandate's issuing, from the date of this order. We partially remand this case to the DC to set the amount and nature of the security as soon as possible. [1629123-1] [88-6467] (jlc)

7/17/89 Filed amended order (WALLACE, POOLE, O'SCANNLAIN) the order filed in this case on 7/11/89, is amended to read as follows: The motion of California for a stay of mandate for 30 days to file a petition for writ of cert. with the USSC is granted. Pursuant to FRAP 41(b), we partially remand this case to the DC to determine whether a bond or other security or condition shall be required of California as a condition to this grant of stay. [88-6467] (jlc)

7/26/89 Filed Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co. emergency motion to vacate the stay of mandate. (7/26) (PANEL) [88-6467] [1637603] (jlc)

7/26/89 Filed order (POOLE, O'SCANNLAIN) the Dfdts-Aplts, American Stores Company, Alpha Beta Acquisition Corp., and Lucky Stores, have filed an emergency motion under Rule 27-3 requesting that the mandate now be issued forthwith. On 7/17/89, we stayed the issuance of mandate for a period of 30 days in order to permit the State of California, Pltf-Aple, to file a petition for cert seeking review of our opinion and order of 3/31/89, which reversed a preliminary injunction theretofore issued by the USDC. The DC's order forbade the Dfdts-Aplts from completing the integration of the operation of their Lucky Stores and Alpha Beta subsidiaries. Our order of 7/17/89 also provided for a limited remand to the DC to determine whether a bond or other security or condition should be required of California as a condition to granting the stay of mandate. The emergency motion advises that on 7/24/89, after hearing and argument pursuant to the limited remand, the DC ordered California to post a bond in the amount of $16,288,298 as the amount necessary to protect Dfdts-Aaplts against mandate. Dfdts-Aplts represent that the State of California has advised them that it intends not to post the bond as ordered, but rather intends to appeal the DC's bond order to this court and, if necessary, to the Supreme Court of the U.S. We order as follows: The State of

California is hereby ordered to file, not later than Noon on Friday, 7/28/89, a response to the emergency motion setting forth whether the representations therein correctly state the fact & amount of bond ordered by the DC; whether the State of California relies in declining to comply therewith. A copy of any such response shall be transmitted immediately to counsel for Dfdts-Aplts. This court will thereafter determine what action is appropriate. [88-6467] (jlc)

7/27/89 Received Appellee State of California letter dated 7/27 re: "We hereby request that the Court allow the State to Mon. noon, 7/31 to file a single document...". (PANEL) [88-6467] (jlc)

7/27/89 Filed order (POOLE, O'SCANNLAIN) the Atty. Gen. of California has requested an ext. until Noon, 7/31/89, within which to respond to our order of 7/26/89, to make opposition to the emergency motion which was the subject of that order, an also to present its own motion with respect to reduction or elimination of the bond fixed by the DC. Upon consideration of the circumstances, the motion for ext. is denied and the time fixed will stand. Upon receipt and consideration of the State's response, this court will determine whether additional submissions or other action may be appropriate. [88-6467] (jlc)

7/28/89 Filed Appellee State of California's response to orders dated July 26 & 27, 1989; declaration of Andrea Ordin. (7/28) (PANEL) [88-6467] (jlc)

7/31/89 Received Appellant American Stores Co. letter dated 7/31 re: "If the court desires a reply...". (casefile) [88-6467] (jlc)

8/1/89 Rec'd. original of California's response filed 7/28. (casefile) [88-6467] (jlc)

8/8/89 Sent letter to Frank Rothman, Esq. from Clerk of Court re: "We are in receipt of your transmittal dated 7/7/89 which was forwarded by Judge Wallace to this office for response. In future correspondence to this court please refer to Circuit Rule 25-2". [88-6467] (jlc)

8/10/89	Filed order (POOLE, O'SCANNLAIN) in Part III of its 7/28/89 response, beginning at page 5, the State of California argues that it is pursuing this litigation in its role as "parens patriae" on behalf of the welfare of its citizens and should not be held to the requirements of a financial bond as is generally the case in private litigation. The State cites several authorities in support of that position. The court now requests dfdts-aplts to address that issue by letter reply not to exceed 10 pgs., the submission to be made on or before the close of business, Mon., 8/14/89. No reply thereto is required unless the court specifically requests the same. [88-6467] (jlc)
8/11/89	Received Appellee State of California letter dated 8/10 re: "California has today filed its Petition for Writ of Certiorari...we will provide you with 4 copies of the petition under separate cover." (PANEL) [88-6467] (jlc)
8/11/89	Copy of letter dated 8/10 received from State of California to USSC re: "Enclosed for filing is California's Petition for Writ of Cert... please advise the Clerk fo the USCA of the filing.". (PANEL) [88-6467] (jlc)
8/14/89	Filed Defendants-Appellants' letter brief in response to order of 8/10. (8/14) (8 pgs) (PANEL) [88-6467] (jlc)

8/15/89	Rec'd. 4 (complimentary) copies of the State of California's petition for a writ of certiorari in the USSC. (8/10) (PANEL & casefile) [88-6467] (jlc)
8/17/89	USSC notification by telephone of the filing of cert on 8/10/89 - SC# 89-258. [88-6467] (jlc)
8/17/89	Filed Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co. emergency motion to issue mandate. (8/17) (PANEL) [88-6467] [1647585] (jlc)
8/17/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) the mandate will issue on Monday, 8/21/89. [1647585-1] [88-6467] (jlc)
8/18/89	Received Appellant Lucky Stores, Inc., Appellant Alpha Beta Acq. Corp., Appellant American Stores Co. letter dated 8/18 re: "In light of yesterday's order, dfdts-aplts withdraw that motion...". (PANEL) [88-6467] (jlc)

8/21/89	Filed Supreme Court order (SC Date: 8/21/89) (O'CONNOR) upon consideration of the application of counsel for the petition and the response filed thereto, it is ordered that the execution & enforcement of the mandate of the USCA for the Ninth Circuit, case No. 88-6467, be, and the same is hereby, stayed pending the disposition by this Court of the petition for a writ of cert. Should the petition for a writ of cert be denied, this stay is to terminate automatically. In the event the petition for a writ of cert is granted, this stay shall continue in effect pending the sending down of the judgment of this Court. [88-6467] (jlc)

8/22/89	Filed Supreme Court amended order (SC Date: 8/22/89) (O'CONNOR) upon consideration of the application of counsel for the petitioner, and the response filed thereto, it is ordered that the execution and enforcement of the mandate of the USCA for the Ninth Circuit, case No. 88-6467, be, and the same is hereby, stayed pending the disposition by this Court of the petition for a writ of cert or further order of the Court. Should the petition for a writ of cert be denied, this stay terminates automatically. In the event the petition for a writ of cert. is granted, this stay shall continue pending the sending down of the judgment of this Court. This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the USDC for the Central District of CA, the adequacy of such bond to be determined by that Court. (PANEL) [88-6467] (jlc)
8/22/89	Filed SC opinion (O'CONNOR) filed 8/22/89 in reference to the SC order filed 8/21 & the amended SC order filed 8/22 regarding the stay of mandate in the Ninth Circuit. (PANEL) [88-6467] (jlc)
8/22/89	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 89-258 filed on 8/10/89. [88-6467] (jlc)

89/25/89	Filed order (WALLACE, POOLE, O'SCANNLAIN) we vacate our orders requiring briefing, posting of bond, and staying the mandate, and we terminate our limited remand. The mandate has been stayed pursuant to the Amended Order of Justice O'Connor dated 8/22/89, conditioned upon the posting of a bond in the DC. [88-6467] (jlc)
9/22/89	Copy of letter dated 9/15 received from USSC to Chester H. Horn re: "An application from respondent for an order resubmitting the bond question was received 9/13/89 and presented to Justice O'Connor. Justice O'Connor has now called for a response to the application to be filed on or before noon, 9/21/89..." (PANEL) [88-6467] (jlc)
9/29/89	Copy of letter to Rex E. Lee dated 9/25 received from USSC re: "Your application for an order resubmitting the bond question to the USDC has been presented to Justice O'Connor, together with the response filed thereto and the reply brief. Justice O'Connor has endorsed on the application the following: DENIED Sandra D. O'Connor 9/25/89." (casefile) [88-6467] (jlc)

RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT
No. 88-5331 KN(TX)

DATE	NR	PROCEEDINGS
9-1-88	am	1. Complt. Isd sums. Case may be ref'd to Mag Tassopulos for discvy.
		2. Appl for a TRO & for an OSC re P/I. pltf LODGED OSC TRO re P/I
		3. Memo of P/A in suppt of applf or a TRO & ORS re P/I. pltfs
		4. Memo in opposn to pltfs motn for a TRO. defts
		5. Declrn of Dr. Robert G. Harris re American/Luck in suppt of appl for a TRO & OSC re P/I. pltf ****UNDER SEAL****
		7. Exh one to complt for equitable relief for violation of title 15 USC secs 1 & 18 & pendent state claims. pltf ****UNDER SEAL****
		8. Declrn of Stephen M. Axinn in opposn to ptlfs motn for TRO. defts

9-2-88 am 9. Pltfs motn for a TRO: Crt reqst stmt frm cnsl for the state of calif. Cnsl address the matter of docms being placed under seal. The crt cont the matter to 9-6-88 @2pm. to allow more time for the crt to review the docms. M.O.

10. Declrn of H. Chester Horn, Jr., in suppt of pltfs appl for a TRO. pltf

11. Appl & ORD allow'g appran of non reas atty Stephen M. Axinn.

12. Appl & ORD allow'g apprnc of non read atty Paul T. Denis.

9-6-88 am 13. Declrn of Richard Frederickson in opposn to pltfs motn for a TRO. defts

9-7-88 am 14. Note of ruling scheduling of hrg. pltf

15. TRO tht American Stores Co, Alpha Beta Acquisition Corp & Lucky Stores Inc & their respective successors & assigns, offrs, etc shall during the pendency of pltfs appl for a P/I be enjoined, restrained & ord'd.

16. OSC re P/I tht the defts American Stores Co, Alpha Beta Acquisition Corp & Lucky Stores Inc show cause bef 9-16-88 @pm why this & their respective successors & assigns, offers, etc should not during the pendcy of this action be enjoined & restrained & ord.

17. Proof of acknowledgement of receipt & acceptance of srv re TRO & P/I. pltf

9-8-88 am 18. Note of motn to dism, rentbl 10-24-88 @10am. defts LODGED propd ord

19. Memo in suppt of defts motn for reconsideration & modification of the TRO. defts

20. Declrn of Stephen M. Axinn in suppt of defts motn for reconsideration & modification of the TRO. defts

21. Ex parte appl for ord shorten'g ti on defts motn for reconsideration & modification of TRO; declrn of Stephen M. Axinn. defts LODGED propd ord

22. Memo in suppt of defts motn to dism. defts

23. Declrn of Lawrence A. Del Santo in suppt of defts motn for reconsideration & modification of the TRO. defts

*9-6-88	am	24. Pltf appl for TRO: Crt takes the matter under submission. M.O. (jc)
9-8-88	am	25. Stat conf: Crt & cnsl discuss TRO. Crt clarifies crt's ruling on TRO. M.O. (jc)
9-12-88	am	26. Stip & ORD tht defts motn to dism for failure to state a claim upon which relief can be granted will be hrd on 9-16-88 together w/pltfs motn for a P/I. All defts papers in resp to pltf motn for P/I will be srv by 9-14-88 @5pm. All ptlfs paper in resp to defts motn to dism will be srv by 9-14-88 @5pm.
		27. MODIFIED TRO tht American Stores Co, Alpha Beta Acquisition Corp & Lucky Stores Inc their resp successors & assigns, offers, etc be enjoined, restrained & ord, etc. (see orig docm in fi for further info)
9-13-88		28. Declrn of Robert P. Bermingham in suppt of objecns of 3rd pty The Vons Co, Inc & Safeway Stores, Inc to American Stores, reqst to prod docms srv on the Cal Atty Gen Safeway Stores Inc.

		29. Declrn of Bernat Rosner in suppt of objecns of Safeway Stores Inc to American Stores reqst to prod docms srv on the Calif Atty Gen. Vons & Safeway Stores Inc.
		30. Objecn to American Stores reqst to prod docms srv on the Calif Atty Gen. Vons Co Inc. & Safeway Stores Inc.
9-15-88	am	31. Declrn of Peter Max in opposn to ptlfs motn for P/I Amer Stores Co & Lucky Stores **UNDER SEAL**
9-15-88	am	32. Declrn of Donald Kaplan in opposn to pltfs motn for P/I. Defts Amer Stores Co & Lucky Stores, Inc.
		33. Declrn of Dr. M.A. Adelman in opposn to ptlfs motn for P/I. Defts Amer Stores Co. & Lucky Stores, Inc.
		34. Declrn of William O. Christy in opposn to pltfs motn for a P/I. Defts Amer Stores & Lucky Stores Inc
		35. Declrn of Gregory V. Woodin opposn to pltfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc
		36. Declrn of Dr. Charles R. Handy. Defts Amer Stores Co & Lucky Stores Inc

37. Declrn of L.S. Skaggs in opposn to ptlfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

38. Declrn of Harley Delano in opposn to pltfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

39. Declrn of Richard London in opposn to pltfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

40. Declrn of John M. Lillie in opposn to pltfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

41. Declrn of John L. Guillory in opposn to pltfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

42. Appendix of other authorities cited in defts memo in opposn to ptlfs motn for a P/I. Defts Amer Stores Co & Lucky Stores Inc

43. Declrn of Keith M. Thye. Defts Amer Stores Co & Lucky Stores Inc ****UNDER SEAL****

44. Declrn of Edgard M. Grubb in opposn to pltfs motn for a P/I. Defts American Stores Co & Lucky Stores Inc ****UNDER SEAL****

45. Memo in opposn to pltfs motn for a P/I. Defts Amer Stoes Inc & Lucky Stores Inc ****UNDER SEAL****

46. Resp of State of Calif to motn to dism. ****UNDER SEAL****

47. Suppl memo of P/A in suppt of pltfs appl for a P/I. pltf ****UNDER SEAL****

48. Declrn of Robert W. Carson. plt

49. Declrn of H. Chester Horn, Jr. in suppt of Calif's motn to strike. pltf

50. Declrn of Owen Lee Kwong. pltf

51. Declrn of Harold C. Hofer. pltf

52. Declrn of Buzz Evers. pltf

53. Objens to & motn to strike portions of defts memo in suppt of defts motn to dism. pltf

9-16-88 am 54. Reply declrn of Robert G. Harris. pltf ****UNDER SEAL****

55. Resp of state of Calif motn to dism. pltf

56. Suppl memo of P/A in suppt of pltfs appl for a P/I. pltf

57. Reply declrn of Bruce W. Marion. pltfs

58. Reply declrn of Bruce W. Marion re hand. pltfs

59. Reply declrn of Willard F. Mueller. pltfs

60. Memo in opposn to pltfs objecns to & motn to strike portions of defts memo in suppt of defts motn to dism. defts

61. Reply memo in suppt of motn to dism & in opposn to pltfs motn for a P/I. defts

62. OSC re P/I defts motn to dism: Crt tks the matter under subm. Crt further ords tht the TRO will remain in effect until the crt issues its ruling on the P/I. Crt reqst tht cnsl submit briefs re Market Share Data by 9-21-88. M.O. (jc)

9-21-88 am 63. Suppl declrn of Peter Max in opposn to pltfs motn for a P/I. defts American Stores Co & Lucky Stores, Inc. ****UNDER SEAL****

64. Suppl memo regard'g Market definition & market structure & memo in opposn to the propd P/I. deft Amer. Stores Co & Lucky Stores Inc ****UNDER SEAL****

9-22-88 am 65. Suppl reply declrn of Robert G. Harris. pltf

66. Suppl memo on Clif concenteration trends. pltf

67. Reply memo regard'g product market definition. pltf

68. Declrn of H. Chester Horn, Jr. regard'g concentration trends. pltf

9-23-88 am 69. Reply memo regard'g market product market definition. defts

70. Declrn of Claude W. Edwards. pltf

9-27-88 am 71. The Court HEREBY ORDERS that the Temporary Restraining Order issued on September 7, 1988 and extended by order of the Court on September 16, 1988 will remain in effect until the Court rules. As the court stated in *State of Maine v. FRI*, 483 F.2d 439, 441 (1st Cir. 1973), "of course, as long as the hearing on the preliminary injunction is held expeditiously within the appropriate time frame, the district court should be able to extend the restraining order while it prepares its decision." Given the complexity of this matter and the fact that the Court requested additional information re market share data which parties submitted on September 21, 1988, the Court finds a reasonable extension fully within its discretion. The Court is mindful of the need for a prompt ruling in this matter. M.O.

9-28-88 am 72. Bef issu'g the Min Ord on 9/27/88 ext'g the TRO until crt reaches a decision in the matter, the crt's secretary was informed by the State of Calif tht the TRO would expire at close of business Tuesday. As a result of this info the crt found it appropriate to ext the TRO. M.O.

9-29-88 am 73. ORD re P/I; P/I

IT IS HEREBY ORDERED this 29th day of September, 1988, at 11:07 a.m., as follows:

That defendants American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc., and their respective successors and assigns, officers, directors, agents, subsidiaries, divisions, groups, affiliates, representatives, employees and attorneys, and all persons acting in concert or participation with them, shall, in accordance with Federal Rule of Civil Procedure 65, during the pendency of this action, be enjoined, restrained and ordered, pursuant to 15 U.S.C. § 26, as follows:

1. Take all steps necessary to operate American Stores Company, Alpha Beta Acquisition Corporation and their subsidiaries, divisions and groups (collectively "American Stores"), independently of the assets and businesses of Lucky Stores, Inc. ("Lucky") in the State of California.

2. Refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988, other than in the ordinary course of business, and shall refrain from taking any further steps to merge or integrate the assets and businesses of American Stores' Alpha Beta California operations with

those of Lucky's California operations or any further steps to merge or integrate the assets and businesses of Lucky's California operations with those of American Stores' Alpha Beta California operations. (ENT 9-30-88) ntc by cpy to pltf

10/3/88 np 74. Fld Deft's notc of appeal to 9th Cir. C/A frm ord fld 9/29/88. $105.00 fing & dcck fee pd.

10-3-88 am 75. Note of ruling re P/I. pltf

10-3-88 am 76. Receipt for repts trans of hrg on 9-2-88(20); 9-6-88(46); 9-8-88(20); & 9-16-88.

77. Tranc designation & ord'g form.

*9-26-88 am 78. Motn to intervene as a pltf. Paul Bechtel

10-5-88 am 79. Paul Bechtel ("Applicant") has lodged with the Court a Motion To Intervene as a plaintiff in this action in order to assert the claims set forth in a proposed Complaint attached to Applicant's Motion. The proposed Complaint alleges breach of contract and tort claims against Lucky Stores stemming from negotiations between Applicant and Alpha Beta, Inc. regarding the lease of a property in Banning, California. Applicant brings his Motion To Intervene under Fed. R. Civ. P. 22(a), Intervention of Right. Rule 22(a) permits intervention in an action when,

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

However, Applicant has failed to demonstrate that disposition of this action may impair or impede the Applicant's ability to pursue the contract and tort claims alleged in his proposed Complaint or to otherwise protect any interests Applicant claims, allegedly relating to the transaction which is the subject of this antitrust action. (The

Court notes that the requirements for permissive intervention under Fed. R. Civ. P. 22(b), that an applicant's claim and the main action have a "question of law or fact in common", also appear not to have been met in this case.) Accordingly, Applicant Paul Bechtel's Motion To Intervene is HEREBY DENIED. M.O.

80. On September 29, 1988, the Court granted Plaintiff State of California's Application for a Preliminary Injunction. Due to an oversight, the Court did not explicitly rule on Defendants' Motion to Dismiss.

Consistent withthe Court's Order granting a preliminary injunction, Defendants' Motion to Dismiss is HEREBY DENIED *nunc pro tunc* to September 29, 1988. Pursuant to Fed. R. Civ. P 12(a), "the responsive pleading shall be served within 10 days after notice of the court's action." M.O.

10-6-88 am 81. ORD re crt guidelines & trial preparation.

10-14-88 am LODGED frm 9TH CCA: ORD tht Appellants' emergency motion for an expedited hearing is granted in part. The requirement of filing a civil appeals docketing statement is waived and no prebriefing conference shall be conducted. The clerk shall set this matter for oral argument in Pasadena the week of December 5, 1988. Appellants' opening brief entitled "Public Record Version Redacted" are ordered filed. Appellants' supplemental brief shall be filed by 5:00 p.m. on October 14, 1988. Appellee's answering brief shall be filed by 5:00 p.m. on October 21, 1988. Appellee's reply brief, if any, shall be filed by 5:00 p.m. on October 26, 1988. No extensions of time will be allowed.

The parties stipulation concerning the filing of documents under seal is construed as a motion to file documents under seal. So construed, the motion is granted.

10-21-88 am 82. ANSWER to complt. defts American Stores Co & Lucky Stores Inc

10-28-88 am 83. Memo in suppt of ord clarify P/I ord. defts LODGED propd ord

*10-27-88	am	84. Crt has recv'd defts telephonic reqst for a brief hrg on the scope of the P/I w/respec to the Fed. Trade Commission ord re divestiture of 37 stores. Crt reqst brief'g frm both ptys prior to schdul'g a hrg date. Pltf has 3 days frm receipt of defts papers to respd. M.O.
11-3-88	am	85. Resp to reqst for clarification of the P/I. pltf **UNDER SEAL**
11-4-88	am	86. Reply memo in suppt of ord clarify'g P/I ord. DEFTS
11-7-88	am	87. The crt has schdl'd a hrg on 11-8-88 @2pm. The crt does not wish to hr ext argument but merely reqst resps to certain questions. M.O.
11-8-88	am	88. Deft's reqst to clarify P/I ord: Crt hrs argument of cnsl. Crt takes the matter under subm. M.O. (kk)
11-9-88	am	89. Clarification of ord re P/I.
12-2-88	am	90. OSC tht cnsl show cause in writ'g nlt 12-15-88 why this action shld not be dism for non complt w/loc rule 6.2. Cnsl are advised tht the crt will consider the fing of the jnt rept of early meet'g on or bef 12-15-88 as a satisfactory resp to the OSC. M.O.

12-14-88	am	91. Jnt rept of early meeting. pltfs Fwd 6 orig clkrs files & 4 orig repts trans to 9th CCA
1-20-89	am	92. ORD re MSC set for 3-13-89 @9:30am.
2-1-89	sb	93. Receipt of reporter transcript 11-8-88 Reporter Transcript of 11-8-88
3-6-88	sb	94. Joint status report pltf LODGED COPY OF Ord C/A parties are free to move to district crt fr modification of the prelim inj
3-13-89	sb	95. MSC off cal pending appeal MO JC
6-23-89	sb	96. Declrn of Frank Rothman deft
6-28-89	sb	97. Stip to modification of prelim inj
7-13-89	sb	98. Hereby ord scheduled a hrg on 7-19-89 at 2pm pur to Ord of 9th Circuit State of Calif file a bond or other security as reimbursement to deft in the event that US Supreme Crt denied certiorari & deft have indicated to the crt that may wish to briefing in the matter deft should such brief NLT 7-17-89 & pltf may reply 7-19-89 10am MO NR

7-14-89	dc	LODGED ord frm US 9th CCA tht this case is partially remanded to dist crt to set the amount and nature of the security as soon as possbl.
7-18-89	sb	99. Notc of motn & memo in suppt of deft motn to require security pending decision on petn fr writ of Certiorari 7-21-89 2pm UNDER
		100. Declrn of Frank Roth in suppt of deft motn UNDER SEAL
		101. Declrn of Victor L Lund in suppt of motn UNDER SEAL
7-19-89	sb	102. Declrn of Dr Willard F Mueller in opp to deft motn to require Security pending decision on petn certiorari
		103. Declrn of Robert G Harris in opp to deft motn to require Security
		104. Declrn of A Sheridan Atkinson in opp to deft motn to req Securi
		105. Opp to State of Calif motn to require Security
7-20-80	la	106. Reply memo in suppt of dfts' mot to reqr scrty pndg decsn. dfts **UNDER SEAL**
7-21-89	la	107. Correctd version of reply memo in supt of mot. dfts **UNDER SEAL**

7-21-89	esl	108. Defts motn for setting of bond pending appeal. Crt hears argument of both cnsl. Crt takes the matter under submission. M.O. (R.C)
67-21-89	bg	109. Crt Ord tht mandate of the 9th Circuit C/A Ord re setting bond pending fur appeal is fld & spread upon the minutes of this U.S. District Crt. (ENT 7-26-89)
7-24-89	esl	110. ORD re motn to require security pending decision on petn for writ of Certiorari, hereby GRANTS deft's motn & HEREBY ORDS the State of Calif. to post a bond in the amt of $16,288,898 for the period frm 7/11/89 'til the Supreme Crt reconvenes on 10/1/89.
8-23-89	ca	111. Memo in suppt of requst to set the amt of the bond pursuant to supreme crt ord. Defts American Stores Co. & Lucky Stores, Inc.

8-21-89	ca	112. Stip & ORD to permit Lucky, a wholly-owned subsidiary of American, to purchase the parcels listed in Exh A hereto using funds in "Starker Trusts" formed by Alpha Beta Co. To permit American & its wholly-owned subsidiary American Stores properties, Inc. ("ASPI") to secure multi-parcel financing arrangements with properties owned by Lucky, provided tht title to such Lucky properties is not transfered fr the present holder thereof & further provided tht American, ASPI & Lucky remain free to sell such properties, if so required, pursuant to Crt Ord.
8-25-89	sb	113. Sugestion of State of Calif regarding amount of bond to Supreme Crt Ord
8-28-89	ca	114. Reply memo in suppt of request to set the amt of the bond. Defts American Stores Company & Lucky Stores, Inc.
8-25-89	ca	LODGED ORD, we vacate our ords requiring briefing, posting of bond & staying the mandate, & we terminate our limited remand. Routed to appeals section
8-30-89	ca	LODGED ORD setting amount of bond purs to supreme crt ord. Defts American Stores Company & Lucky Stores.

8-31-89	ca	115. ORD tht purs to the ord of justice Sandra Day O'Connor dated 8/27/89, bond is in the above-captioned mater at $10,000.00. Defts American Store Co. & Lucky Stores, Inc.
8-29-89	ca	116. Pltfs motn to set amt of Bond purs to Supreme Crt Ord. Crt hears argument of consl. Crt re sets bond at $10,000.00. M.O. C/R Rosa Nealy.
9-6-89	ca	117. The Crt has rec'd a letter frm defts consl re the State of Calif. Propsd findings of fact & conclusions of law & ord setting the amt of the bond. Purs to local rule 2.10, the crt is unable to consider such a letter. Consl is advised to call such matters to the crts attention by appropriate appli or motn fld in compliance with the local rules. M.O. C/R none.
9-6-89	ca	118. Obj to props findings of fact, conclusions of law & Ord setting the amt of bond. Defts. American Stores Co. & Lucky Stores, Inc.
9-7-89	ca	119. Resp to American Stores Obj to Propsd findings of fact. Atty for State of Cal.
9-13-89	sb	120. Finding of fact concl of law setting amount of Bond $10,00 to be post or deposit before 9-7-89

8-31-89 sb 121. Notc of posting Cash Bond in the amount of $10,000

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Filed

September 1, 1988

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA by its Attorney General, JOHN K. VAN DE KAMP, Plaintiff, v. AMERICAN STORES COMPANY, a Delaware corporation, ALPHA BETA ACQUISITION CORPORATION, a Delaware corporation, and LUCKY STORES, INC. a Delaware corporation, Defendants.	Civil No. 88-5331-KN(Tx) COMPLAINT FOR EQUITABLE RELIEF FOR VIOLATION OF TITLE 15 U.S.C. SECTIONS 1 AND 18 AND PENDENT STATE CLAIMS ANTITRUST

Plaintiff State of California, on its own behalf and as parens patriae on behalf of its residents, by and through its Attorney General, John K. Van de Kamp, brings this civil action to obtain equitable and other relief against the defendants named herein for violations of the antitrust laws of the United States and of the antitrust and unfair competition laws of the State of California, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover for injuries sustained and to prevent and restrain the violation by defendants, as hereinafter alleged, of section 7 of the Clayton Act (15 U.S.C. § 18). This Court has jurisdiction over this action pursuant to Title 28 U.S.C. section 1337.

2. The complaint is filed and the action is also instituted under section 1 of the Act of Congress of July

2, 1890, 15 U.S.C. § 1. commonly known as the Sherman Act, to recover for injuries sustained and to prevent and restrain the violation by defendants, as hereinafter alleged, of section 1 of the Sherman Act (15 U.S.C. § 1). This Court has jurisdiction over this action pursuant to Title 28 U.S.C. § 1337.

3. This Court has pendent jurisdiction over the claims of plaintiff arising out of alleged violations of California Business and Professions Code sections 16720(a), 16720(e)(4), 16726, 16753, 16754, and 16754.5, commonly known as the Cartwright Act and Business and Professions Code sections 17200, 17203, 17204, and 17206, commonly known as the Unfair Competition Act.

4. Venue is proper under section 12 of the Clayton Act (15 U.S.C. § 22) and Title 28 U.S.C. § 1391(b) and (c), since each defendant maintains an office, transacts business, has an agent, or is found within the Central District of California, as a district wherein this claim arises and all of the defendants are doing

business, and each defendant is within the jurisdiction of this Court for the purpose of service of this complaint. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in material part within the Central District of California.

II

DEFINITIONS

5. "Supermarkets" means full-line grocery stores exceeding 10,000 square feet.

III

PLAINTIFF

6. California is one of the sovereign states of the United States, and by and through its Attorney General, John K. Van de Kamp, brings this action as parens patriae on behalf of its residents, pursuant to Title 15 U.S.C. section 26, California Business and Professions Code sections 16760, 17204, and 17206, and the Attorney General's common law powers, to protect the economy

of the state. As a purchaser of products sold by defendants and their competitors, California also brings this action on its own behalf.

IV

DEFENDANTS

7. American Stores Company is made a defendant herein. American Stores Company is a corporation organized under the laws of the State of Delaware with its corporate headquarters and principal place of business at P.O. Box 27447, 444 East First South, Salt Lake City, Utah 84127. American Stores Company does substantial business within the State of California, conducted at retail outlets throughout the state and managed through executive offices located in Irvine, California. American Stores Company, through its subsidiaries, divisions or groups, is engaged primarily in the operation of retail stores, selling drug and food merchandise through approximately 1500 retail drug stores, supermarkets and combination drug and food

supermarkets, in 40 states. It owns and operates approximately 240 supermarkets in California. American Stores Company, its subsidiaries, divisions and groups are sometimes hereinafter referred to as "American."

8. Alpha Beta Acquisition Corporation is made a defendant herein. Alpha Beta Acquisition Corporation is a wholly owned subsidiary of American Stores Company, and is a Delaware corporation having its corporate headquarters in Salt Lake City, Utah and its principal place of business in Irvine, California. Alpha Beta Acquisition Corporation was formed for the purpose of acquiring Lucky Stores, Inc. Alpha Beta Acquisition Corporation, American Stores Company and their respective subsidiaries, divisions and groups are sometimes hereinafter collectively referred to as "American."

9. Lucky Stores, Inc. is made a defendant herein. Lucky is a corporation organized under the laws of the

State of Delaware with its principal place of business in Dublin, California. On December 22, 1986, Lucky Stores, Inc., reincorporated from California to Delaware, adopting a new Certificate of Incorporation. Lucky Stores, Inc. and its subsidiaries division or groups operate supermarkets in Arizona, California, Florida, Illinois, Indiana, Iowa and Nevada, approximately 340 of which are in California. Lucky Stores, Inc., its subsidiaries, divisions and groups are hereinafter referred to as "Lucky."

V

OTHER RELATED PERSONS

10. The Vons Companies, Inc. is a Michigan corporation which, through its subsidiaries, divisions or groups, operates approximately 183 supermarkets in California. The Vons Companies, Inc. has two subsidiaries which are wholly owned, Pantry Food Markets, Inc. of California is a division of The Vons Companies, Inc. and Expo Stores, Inc., which does

business as Tianguis. The Vons Companies, Inc., its subsidiaries, divisions and groups are hereinafter referred to as "Vons."

11. Safeway Stores, Incorporated operates a supermarket chain in California and elsewhere offering broad lines of merchandise, both nationally advertised and private label brands. In support of its retail operations, Safeway Stores, Incorporated operates extensive distribution, manufacturing and processing facilities in California. Safeway Stores, Incorporated, its subsidiaries, divisions and groups are sometimes hereinafter referred to as "Safeway."

VI

TRADE AND COMMERCE

12. A relevant line of commerce or product market is the retailing by supermarkets of food and non-food products.

13. The following areas of California, which are more particularly described in Exhibit 1 to this complaint

which is incorporated herein by reference, are relevant geographic markets:

1. Walnut Creek
2. Oakland
3. Hayward
4. Antioch
5. Richmond
6. Fremont
7. Livermore
8. San Mateo
9. San Francisco
10. Daly City
11. San Rafael
12. Sunnyvale
13. San Jose
14. Gilroy
15. Palo Alto
16. Watsonville
17. Santa Cruz

18. Healdsburg
19. Santa Rosa
20. Sonoma
21. Napa
22. Vallejo
23. Fairfield
24. Monterey
25. Salinas
26. Costa Mesa
27. Anaheim
28. Laguna
29. Viejo
30. Covina
31. Long Beach
32. Los Angeles
33. Pasadena
34. Tujunga
35. Lancaster
36. Ontario

37. San Fernando
38. Santa Clarita
39. Simi
40. Thousand Oaks
41. Oxnard-Ventura
42. Palm Springs
43. Barstow
44. Blythe
45. San Bernardino
46. Victorville
47. Sun City
48. Yucca Valley
49. Banning-Beaumont
50. Riverside
51. Indio
52. El Cajon
53. Chula Vista
54. La Jolla
55. San Diego

56. Escondido

57. La Mesa

58. Oceanside

59. Lompoc

60. Santa Barbara

61. Santa Maria

62. Bakersfield

14. The supermarket industry in the various relevant geographic markets is moderately to highly concentrated.

15. Barriers to entry in the supermarket industry in California are moderate to high.

16. American and Lucky are actual and significant competitors in the relevant product market in almost all of the relevant geographic markets, and are potential significant competitors in the few relevant geographic markets in which they are not actual or direct competitors.

17. Vons and Safeway were actual and significant competitors in the relevant product market in almost all of the relevant geographic markets in Southern California.

18. On or about December 3, 1987, defendant Vons entered into an agreement with defendant Safeway whereby it agreed to purchase the capital stock of four subsidiaries of Safeway. The acquisition of these subsidiaries includes 172 supermarkets and related assets, including warehouses, distribution and processing centers (dairies, ice cream plants and bakeries), currently operated as Safeway's Southern California Division.

19. Under the terms of the agreement for the sale to Vons of Safeway's Southern California Division, Safeway received $325,000,000 in cash, 30% of Vons stock (11.7 million shares), two of the nine seats on Vons' board of directors, and the right to purchase another 5% of Vons' stock in market transactions. The Vons acquisition of Safeway's Southern California

Division received final approval of the Federal Trade Commission on August 31, 1988.

20. American, Lucky, Vons, and Safeway regularly purchase for resale in supermarkets which each operates in California, substantial quantities of food and non-food products which are sold, manufactured and shipped in interstate commerce. American, Lucky, Vons, and Safeway each sell in supermarkets which each operate in California, substantial quantities of food and non-food products which have been in interstate commerce. American, Lucky, Vons, and Safeway are each engaged in interstate commerce, and their activities are in the flow of and substantially affect interstate commerce. Interstate commerce has been and will be affected by each of the merger-acquisitions described in this complaint.

VII

VIOLATION ALLEGED

AS A FIRST CLAIM FOR RELIEF AGAINST DEFENDANTS AMERICAN AND LUCKY FOR VIOLATION OF CLAYTON ACT SECTION 7, PLAINTIFF ALLEGES:

21. Plaintiff realleges and incorporates herein by reference all allegations contained in paragraphs 1 through 20 of this complaint, as though set forth in their entirety.

22. On or about March 22, 1988, defendant American made and announced a cash tender offer of $45 per share for all of the outstanding stock of defendant Lucky. American's stated purpose in the tender offer was to acquire control of, and the entire equity interest in Lucky, and then to effect a merger or similar combination with Lucky. On or about May 17, 1988, American increased its tender offer to $65 per share. The tender offer constitutes a major transaction in interstate commerce with a value in excess of

$2,510,000,000. On or about May 20, 1988, Lucky agreed to merge with American. Plaintiff is informed and believes, and based upon said information and belief alleges, that pursuant to said tender offer American has acquired more than a majority of Lucky's outstanding common shares. The acquisition, if consummated, would give American control of Lucky and permit it to combine Lucky's approximately 340 California supermarkets with American's approximately 240 Alpha Beta supermarkets in California.

23. The acquisition of Lucky by American is but one of two enormous supermarket industry mergers now underway. On or about December 3, 1987, defendant Vons entered into an agreement with defendants Safeway whereby it agreed to purchase the capital stock of four subsidiaries of Safeway. The acquisition of these subsidiaries includes 172 supermarkets and related assets, including warehouses, distribution and processing centers (dairies, ice cream plants and bakeries), currently

operated as Safeway's Southern California Division. Vons operates approximately 183 supermarkets in Southern California.

24. The effect of the acquisition by American of Lucky, if consummated, and in light of the Vons acquisition of Safeway's Southern California Division, may be substantially to lessen competition in the aforesaid trade and commerce in the following ways, among others:

a. Actual or direct competition, and potential competition between American and Lucky in the relevant product market in many relevant geographic markets would be eliminated;

b. Lucky would be eliminated as a substantial and independent competitor in the relevant product market in the relevant geographic markets;

c. Competition between competitors in general in the relevant product market in the relevant geographic markets would be substantially lessened;

d. Significant increases in already high levels of concentration would result in the relevant product market in the relevant geographic markets;

e. Already moderate to high barriers to entry in the relevant markets would be substantially increased;

f. Competition in the relevant product market in the relevant geographic markets may be substantially lessened such that the prices of food and non-food products might be increased.

25. The acquisition of Lucky by American as alleged herein violates section 7 of the Clayton Act (15 U.S.C. § 18).

VIII

VIOLATION ALLEGED

AS A SECOND CLAIM FOR RELIEF AGAINST DEFENDANTS AMERICAN AND LUCKY FOR VIOLATION OF SHERMAN ACT § 1, PLAINTIFF ALLEGES:

26. Plaintiff realleges and incorporates herein by reference all allegations contained in paragraphs 1

through 20 and 22 through 24 of this complaint, as though set forth in their entirety.

27. The proposed acquisition by American of Lucky as alleged herein constitutes a combination and contract in restraint of trade and commerce in violation of section 1 of the Sherman Act (15 U.S.C. §1).

IX

VIOLATION ALLEGED

AS A THIRD CLAIM FOR RELIEF AGAINST DEFENDANTS AMERICAN AND LUCKY FOR VIOLATION OF CALIFORNIA'S CARTWRIGHT ACT, PLAINTIFF ALLEGES:

28. Plaintiff realleges and incorporates herein by reference all allegations contained in paragraphs 1 through 20 and 22 through 24 of this complaint, as though set forth in their entirety.

29. The proposed acquisition of Lucky by American as alleged herein violates sections 16720(a), 16720(e)(4), and 16726 of the California Business and Professions Code, which are part of the Cartwright Act.

X

VIOLATION ALLEGED

AS A FOURTH CLAIM FOR RELIEF AGAINST DEFENDANTS AMERICAN AND LUCKY FOR VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION ACT, PLAINTIFF ALLEGES:

30. Plaintiff realleges and incorporates herein by reference all allegations contained in paragraphs 1 through 20 and 22 through 24 of this complaint, as though set forth in their entirety.

31. By performing the acts alleged above, defendants American and Lucky, and each of them, have engaged and continue to engage in unfair and unlawful trade practices, thereby violating sections 17200, 17203, and 17206 of the California Business and Professions Code.

PRAYER

WHEREFORE, plaintiff prays:

FOR INJUNCTIVE RELIEF, PURSUANT TO THE FIRST, SECOND, THIRD AND FOURTH CLAIMS FOR RELIEF:

1. That pending final adjudication of the merits of this Complaint, a temporary restraining order and a preliminary injunction be issued against the defendants American and Lucky preventing and restraining each of them, and all persons acting on their behalf, from taking any action, either directly or indirectly, in furtherance of the proposed acquisition of Lucky, and requiring American to hold and operate separately from American all of Lucky's California assets and businesses pending final adjudication of the merits of this action; and,

2. That such injunctive relief, including rescission, be ordered as is necessary and appropriate to prevent the effects of the unlawful activities alleged in the First, Second, Third and Fourth Claims for Relief and to

maintain competitive conditions in the relevant markets; and,

3. That the acquisition by American of Lucky's California assets and businesses be adjudged and decreed to be unlawful and in violation of section 7 of the Clayton Act (First Claim for Relief), section 1 of the Sherman Act (Second Claim for Relief), sections 16720(a), 16720(e)(4), and 16726 of the California Business and Professions Code (Third Claim for Relief), and sections 17200 and 17203 of the California Business and Professions Code (Fourth Claim for Relief); and,

4. That the defendants and all persons acting on their behalf be permanently enjoined from carrying out any agreement, understanding, or plan, the effect of which would be to combine the supermarket business of American and Lucky; and

5. That pursuant to 15 U.S.C. § 26 and sections 16753 and 16754.5 of the California Business and Professions Code,the Court issue an injunction requiring

American to divest itself of all of Lucky's assets and businesses in the State of California.

6. That plaintiff be awarded civil penalties in an amount to be determined by the Court pursuant to California Business and Professions Code section 17206.

7. That the plaintiff have such other and further relief as the case requires and the Court may deem just and proper; and

8. That the plaintiff recover attorneys fees and it costs of suit.

DATED: September 1, 1988

JOHN K. VAN DE KAMP, Attorney General
of the State of California
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
SANFORD N. GRUSKIN,
Assistant Attorney General
OWEN LEE KWONG,
H. CHESTER HORN,
LAWRENCE R. TAPPER,
ERNEST MARTINEZ,
Deputy Attorneys General

[Signature block omitted]

[Affidavit of Service not printed]

(EXHIBIT 1 TO THE COMPLAINT FILED UNDER SEAL)

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Attorneys for Defendants
American Stores Company
and Lucky Stores, Inc.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by its Attorney General, JOHN K. VAN DE KAMP, Plaintiff, v. AMERICAN STORES COMPANY, et al., Defendants.	Case No. CV 88-5331 KN(TX) DEFENDANTS' ANSWER

Defendants American Stores Company and Lucky Stores, Inc., ("Defendants") by their attorneys Skadden, Arps, Slate, Meagher & Flom answer the Complaint of the Plaintiff, State of California ("Plaintiff"), as follows:

1. Defendants admit that Plaintiff purports to file the Complaint and institute this action under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 and that Plaintiff pur-ports to base this Court's jurisdiction on 28 U.S.C. § 1337, and deny the remaining allegations of Paragraph 1 of the Complaint.

2. Defendants admit that Plaintiff purports to file the Complaint and institute this action under Section 1 of the Act of Congress of July 2, 1890, 15 U.S.C. § 1, commonly known as the Sherman Act, and deny the remaining allegation of Paragraph 2 of the Complaint.

3. Defendants admit that Plaintiff purports to assert claims under California Business and Professions Code §§ 16720(a), 16720(e)(4), 16729, 16753, 16754, 16754.5, 17200, 17302, 17204 and 17206, and that Plaintiff

purports to bring this action pursuant to this Court's pendent jurisdiction, and denies the remaining allegations of the Complaint.

4. Defendants admit that Plaintiff purports to base venue on Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391 (b) and (c), admit that Defendants maintain offices, transact business, have agents, or are found within the Central District of California, admit that Defendants are doing business within the Central District of California, admit that Defendants are within the jurisdiction of this Court for the purpose of service of the complaint, admit that the interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on within the Central District of California, and deny all the remaining allegations of Paragraph 4 of the Complaint.

5. Defendants aver that Paragraph 5 of the Complaint contains certain definitional allegations that do not require a response. Defendants deny the

allegations of Paragraph 5 of the Complaint to the extent that they require an admission of denial.

6. Defendants admit that Plaintiff purports to bring this action as *parens patriae* on behalf of its residents, pur-suant to 15 U.S.C. § 26, California Business and Professions Code Sections 16760, 17204, and 17206, and the Attorney General's common law powers, to protect the economy of the state, admit that Plaintiff also purports to bring this action on its own behalf as a purchaser of products sold by Defendants and their competitors, and deny knowledge or information sufficient to form a belief as to whether Plaintiff actually has made purchases from Defendants.

7. Defendants admit that American Stores Company is a corporation organized under the laws of the State of Delaware, admit that American Stores Company subsidiaries, divisions or groups, are engaged primarily in the operation of retail stores, selling drug and food merchandise, through approximately retail drug

stores, supermarkets and combination drug and food supermarkets, and deny the remaining allegations of Paragraph 7 of the Complaint.

8. Defendants admit that Alpha Beta Acquisition Corporation was formed for the purpose of acquiring Lucky Stores, Inc., deny the remaining allegations of Paragraph 8 of the complaint and aver that Alpha Beta Acquisition Corporation was merged with and into Lucky Stores, Inc., on June 9, 1988 and thereafter ceased to exist.

9. Defendants admit that Lucky Stores, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Dublin, California, admit that on December 22, 1986, Lucky Stores, Inc., reincorporated from California to Delaware, adopting a new Certificate of Incorporation, admit that Lucky Stores, Inc. and it's subsidiaries, divisions or groups operate supermarkets in California and Nevada approximately 340 of which are in California, and deny

the remaining allegations of Paragraph 9 of the Complaint.

10. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint.

11. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint.

12. Defendants deny the allegations of Paragraph 12 of the Complaint.

13. Defendants admit that Bakersfield, as more particularly described in Exhibit 1 to the Complaint, is a relevant geographic market, and deny the remaining allegations of Paragraph 13 of the Complaint.

14. Defendants deny the allegations of Paragraph 14 of the Complaint.

15. Defendants deny the allegations of Paragraph 15 of the Complaint.

16. Defendants deny the allegations of Paragraph 16 of the Complaint.

17. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the Complaint.

18. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18 of the Complaint.

19. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 19 of the Complaint.

20. Defendants admit that Lucky and subsidiaries of American purchase for resale in supermarkets which each operation in California, food and non-food products which are sold, manufactured and shipped in interstate commerce; admit that Lucky and subsidiaries of American each sell in supermarkets which each operate in California, food and non-food products which have been in interstate commerce; admit that Lucky and

subsidiaries of American are each engaged in interstate commerce, and their activities are in the flow of interstate commerce, deny knowledge or information sufficient to form a belief as to the allegations that Vons and Safeway regularly purchase for resale in California, substantial quantities of food and non-food products which are sold, manufactured and shipped in interstate commerce that Vons and Safeway each sell in supermarkets which each operate in California, substantial quantities of food and non-food products which have been in interstate commerce, that Vons and Safeway are each engaged in interstate commerce and that their activities are in the flow of and substantially affect interstate commerce; and deny the remaining allegations of Paragraph 20 of the Complaint.

21. In response to Paragraph 21 of the Complaint, Defendants repeat and reallege as if fully incorporated herein all of their answers and averments

with respect to Paragraphs 1 through 20 of the Complaint.

22. Defendants admit that American made and announced a cash tender offer at $45 per share for all the outStanding stock of Lucky, admit that American increased its offer to $65 per share, admit that the tender offer constituted a major transaction in interstate commerce with a value in excess of $2,510,000,000, admit that pursuant to a tender offer, American acquired more than a majority of Lucky's out-standing common shares, deny the remaining allegations of Paragraph 22 of the Complaint, and aver that by June 9, 1988 American owned 100 percent of the shares of Lucky.

23. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23 of the Complaint.

24. Defendants deny the allegations of Paragraph 24 of the Complaint.

25. Defendants deny the allegations of Paragraph 25 of the Complaint.

26. In response to Paragraph 26 of the Complaint, Defendants repeat and reallege as if fully incorporated herein all of their answers and averments with respect to Paragraphs 1 through 20 and 22 through 24 of the Complaint.

27. Defendants deny the allegations of Paragraph 27 of the Complaint.

28. In response to Paragraph 28 of the Complaint, Defendants repeat and reallege as if fully incorporated herein all of its answers and averments with respect to Paragraphs 1 through 20 and 22 through 24 of the Complaint.

29. Defendants deny the allegations of Paragraph 29 of the Complaint.

30. In response to Paragraph 30 of the Complaint, Defendants repeat and reallege as if fully incorporated herein all of their answers and averments

with respect to Paragraphs 1 through 20 and 22 through 24 of the Complaint.

31. Defendants deny the allegations of Paragraph 31 of the Complaint.

32. The remainder of the Complaint following Paragraph 31 contains Plaintiff's prayer for relief and thus does not require a response.

AFFIRMATIVE DEFENDANTS

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Complaint is barred in whole or in part by the doctrines of estoppel and laches.

3. The Complaint is barred in whole or in part by the Supremacy Clause of the United States Constitution.

4. The Complaint is barred is whole in part because Plaintiff lacks standing to sue and the Complaint cannot be prosecuted as a *parens patriae* action on behalf of the general welfare and economy of the State.

5. The Complaint is barred in whole or in part because of the prior action of the Federal Trade Commission.

6. The relief sought is unavailable to plaintiff because of plaintiff's inequitable conduct.

7. Defendants hereby give notice that they intend to rely on such other and further defenses as may become apparent during discovery in this case.

WHEREFORE, having fully answered the allegations of the Complaint, Defendants pray that judgment be entered against Plaintiff:

1. Dismissing with prejudice Plaintiff's Complaint;

2. Denying Plaintiff's request for injunctive relief, rescission, divestiture, and civil penalties;

3. Denying Plaintiff's request for the award of attorneys fess and its cost of suit.

4. Awarding Defendants their cost of suit, attorneys fees and such other and further relief as this Court may seen just and proper.

DATED: October 20, 1988.

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

By: /s/ Stephen M. Axinn

Stephen M. Axinn

Attorneys for Defendants
American Stores Company
and Lucky Stores, Inc.

[Affidavit of Service not printed]

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 30, 1989, I served the within Joint Appendix in re: "State of California vs. American Stores Co., Alpha Beta" in the United States Supreme Court, October Term 1989, No. 89-258, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Rex E. Lee
Carter G. Phillips
Mark D. Hopson
Gene C. Schaerr
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 1989, at Los Angeles, California.

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(6)

No. 89-258

Supreme Court, U
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JOSEPH F. SPANIO
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., AND LUCKY STORES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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November 16, 1989

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) Bowne Co.

QUESTION PRESENTED

Whether divestiture is a form of injunctive relief under section 16 of the Clayton Act (15 U.S.C. § 26) available to district courts to remedy mergers violating section 7 of the Clayton Act (15 U.S.C. § 18).

LIST OF PARTIES

The petitioner is the State of California by its Attorney General, John K. Van de Kamp.

The respondents are American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP
Petitioner,
v.
AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 872 F.2d 837. (Pet. App. A, pp. A1-A21.) The opinion of the District Court is reported at 697 F.Supp. 1125. (Pet. App. B, pp. B1-B25.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1989. Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* was denied on July 3, 1989. (Pet. App. C.) California's petition for a writ of certiorari was timely filed on August 10, 1989. On August 22, 1989, the Court, per O'Connor, J. (in chambers), stayed the mandate of the court of appeals until disposition of California's petition or further order of this Court. California's petition was granted on October 16, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of any other corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982):

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief. . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and

> principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

STATEMENT

On March 21, 1988, American initiated a hostile takeover bid for the Lucky supermarket chain with the intent of merging Lucky's operations in California with those of American's Alpha Beta Stores, Inc. ("Alpha Beta"), bringing under one management 592 California supermarkets. (Pet. App. A at A6.) Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR) (15 U.S.C. § 18a), American Stores gave notice of its intentions to the FTC. (Pet. App. A at A6.)

California immediately began an investigation of the Lucky acquisition. In mid-April, American Stores delivered some 72 boxes of documents and hundreds of pages of interrogatory responses comprising its HSR filing with the FTC to petitioner. (ER 594.) Petitioner retained three economists with national reputations as experts in retail food distribution to advise it concerning the competitive implications of American Stores' acquisition of Lucky (ER 30, 142, 153, 175, 600 and 990).

For more than two months, Lucky's management resisted American's hostile tender offer as inadequate. (ER 592-94.) But, on May 23, 1988, Lucky's board approved a merger of the two firms after American Stores increased its offer. (Pet. App. A at A6.) The FTC concluded that the merger, as proposed, would

violate section 7 of the Clayton Act (15 U.S.C. § 18) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). On May 31, 1988 -- only eight days after Lucky agreed to the merger -- the FTC issued an administrative complaint alleging substantial injuries to competition in the retail sale and distribution of food and grocery items in supermarkets throughout California. (ER 598Y-CC.)

Simultaneous with publication of the complaint, the FTC released a proposed consent agreement its staff had negotiated with American, proposing settlement of its complaint in exchange for American's agreement to comply with certain demands, including sale of 37 supermarkets in California. (Pet. App. A at A6-7.) The FTC solicited public comment on the proposed consent agreement pursuant to its regulations governing consent agreement procedures. (16 C.F.R §§ 2.31-2.34, 3.25.) The Commission entered into a Hold Separate Agreement with American requiring it to hold the operations of Lucky separate from those of Alpha Beta until the completion of the Commission's review of the proposed consent order, including review of the public comments required under the Commission's regulations. (Pet. App. B at B20-22.)

Petitioner repeatedly warned American that failure of the FTC to remedy California's concerns could result in an action under section 7. (Pet. App. B at B23.) American ignored the warnings and on June 2, 1988, just two days after the FTC opened its comment period, accepted for payment all of the tendered Lucky shares -- more than 94% of Lucky's outstanding stock. (ER

596.) On June 9, American Stores completed its acquisition of the Lucky stock by accomplishing a short-form merger under Delaware law. (*Ibid.*)

On July 22, 1988, petitioner filed timely comments with the FTC analyzing the substantial harm the Lucky acquisition threatened to California consumers and recommending withdrawal of the FTC's proposed consent agreement. (Pet. App. B at B23.) On August 31, 1988, the FTC gave final approval to the proposed consent order without addressing any of the concerns expressed by petitioner. (*Ibid.*)

Having concluded that the merger presented a serious threat to a vital California industry, petitioner filed this suit one day later on September 1, 1988. (*Ibid.*) The preliminary injunction was granted on September 29, 1988. (Pet. App. B at B1.) The preliminary injunction required American:

1. To take all steps necessary to operate American, Alpha Beta, and their respective subsidiaries, divisions and groups independently of the assets and businesses of Lucky in the State of California.

2. To refrain from taking any action to modify the September 6, 1988, status quo as to the California operations of Alpha Beta or Lucky other than in the ordinary course of business, and to refrain from taking any further steps to merge or integrate the assets and businesses of American's Alpha Beta California operations and those of Lucky's California operations. (*Ibid.*, at B25.)

Two of the district court's findings supporting this order require emphasis:

> (1) The District Court found that, even assuming compliance with the conditions imposed by the FTC's consent order, "the overwhelming statistical evidence has demonstrated a strong probability the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act." (Pet. App. B at B24.)
>
> (2) The District Court found that "unless the defendants are enjoined [from completing the merger of Lucky and Alpha Beta], the citizens of California will be substantially and irreparably harmed." (Pet. App. B at B24-25.)

In arriving at these conclusions, the District Court rejected respondents' argument that this merger was "completed" when the Lucky stock purchase was accomplished and found that the effect of the FTC's Hold Separate Agreement was to insure that Lucky and Alpha Beta "retain[ed] their separate names and with them their respective corporate identities." (Pet. App. B at B21.) But the District Court found that absent an injunction, American Stores could "restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent." (*Ibid.*) The District Court concluded that the preliminary injunction was necessary "to remedy effectively the unlawful merger." (*Ibid.*, at B22.)

On March 31, 1989, the Ninth Circuit affirmed the District Court's findings concerning the likelihood that California would prevail on its claim that this merger violates section 7 of the Clayton Act. (Pet. App. A at A8-15.) The Court of Appeals did not disagree that California had sustained its burden of proving the need for preliminary injunctive relief. (Pet. App. A at A16.) Nor did it dispute the District Court's conclusion that the injunction was necessary "to remedy effectively the unlawful merger." (Pet. App. B at B22.) However, the Court of Appeals held that the preliminary injunction ordered by the District Court was an abuse of discretion because "divestiture, whether direct or indirect, is not an available form of relief under section 16 of the Clayton Act for a private party such as California." (Pet. App. A at A19.)

The Court of Appeals reasoned that the preliminary injunction was designed to preserve the possibility of divestiture and itself amounted to "indirect divestiture" by ordering Lucky and Alpha Beta to operate separately in California. (Pet. App. A at A18-20.) In both respects, the Court said, the injunction contravened its earlier holding in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) ("*IT&T*") that divestiture is not a remedy available under section 16. (Pet. App. A at A17-18.) Because the preliminary injunction was designed to preserve relief not available to California under the Ninth Circuit's previous interpretations of section 16 of the Clayton Act, the court struck it down as "overly broad." (*Ibid.*, at A20.)

On July 3, 1989, the Court of Appeals denied California's petition for rehearing. (Pet.App. C.)

On October 16, 1989, this Court granted California's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Since divestiture is injunctive relief which will prevent threatened loss or damage, it is authorized by the plain language of section 16 of the Clayton Act. The Act places no restrictions on the power of district courts to provide effective relief. The absence of such restrictions is important because Congress knows how to place restrictions on section 16 relief when it intends to do so, as it expressly did in section 20 of the Clayton Act. The history of equitable remedies was known to Congress in 1914 and clearly included the flexibility to award divestiture if necessary to provide effective relief. The decision below is not consistent with the Court's jurisprudence concerning the rare circumstances when Congressional limits on the inherent equitable powers of the courts will be implied.

The purpose of section 7 of the Clayton Act was to arrest increasing concentration and stop the threat to competition that it posed. Section 16 must be interpreted consistent with that Congressional aim. Acquisition of Lucky by American Stores threatens the very harm section 7 was designed to prevent. That is why the District Court found that its preliminary injunction was necessary to preserve the possibility of effective relief.

The decision below is inconsistent with virtually all of the policies underlying section 7 and section 16 of the Clayton Act. They were designed to make the private action an effective weapon in the fight to preserve our nation's competitive economy. This Court's experience, and that of the lower courts, shows that divestiture is particularly appropriate in horizontal merger cases. Other forms of relief are rarely as effective.

The no-divestiture rule deprives the courts of the power to close important gaps in the merger enforcement program envisioned by Congress when it enacted the Hart-Scott-Rodino Act of 1976. Because the federal enforcement agencies are being overwhelmed by their HSR review responsibility, they are unable to close those gaps or challenge effectively all mergers raising section 7 concerns. Private parties, and especially state Attorneys General, can and do play an important role in the coordinated enforcement process Congress intended.

The legislative history of the Clayton Act shows that Congress intended to grant to the courts the same powers to provide effective relief in cases brought under section 16 that it gave the courts in cases brought by the government. Since there is no dispute that the government can secure the remedy of divestiture, it follows that private parties should have the same right.

ARGUMENT

I.

THE PLAIN LANGUAGE OF SECTION 16 AUTHORIZES DIVESTITURE TO REMEDY A VIOLATION OF THE CLAYTON ACT

Section 16 of the Clayton Act, 15 U.S.C. section 26, provides in part:

> "Any person . . . shall be entitled to . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

An injunction mandating divestiture of assets acquired in violation of section 7 of the Clayton Act is clearly injunctive relief that will prevent "threatened loss or damage by a violation of the antitrust laws." As the First Circuit held in finding that divestiture is available under section 16 to remedy violations of section 7, "[t]he statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order." (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 416 (1st Cir. 1985).) As this Court has so often reminded, "Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of

that jurisdiction is to be recognized and applied." (E.g., *Brown v. Swann*, 10 Pet. 497, 503 [35 U.S. 331] (1836).)

Despite the expansive and unqualified language of section 16, the Ninth Circuit below held that the statute does not permit district courts to mandate the injunctive remedy of divestiture in cases brought under section 7. The court apparently believed that Congress' use of the phrase "injunctive relief" was somehow intended to limit the remedies available under section 16 in contrast to the supposedly broader language of section 15 of the Clayton Act, which even the Ninth Circuit concedes permits the remedy of divestiture. (*IT&T*, *supra*, at 924.) That conclusion, however, finds no support in the decisions of this Court or the history of equitable remedies. To the contrary, the Court has stressed that divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found." (*United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948).) This Court's insistence on preserving the full panoply of equitable powers available to district courts has also found clear expression in its decisions interpreting section 16 of the Clayton Act. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); accord, *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).)

A. Section 16 Confirms the District Court's Traditional Equitable Power To Order Whatever Remedies Are Needed To Provide Effective Relief

The whole history of the development of equitable powers suggests that the phrase "injunctive relief" in

section 16 of the Clayton Act includes whatever remedies are necessary to provide effective relief. The Restatement 2d, Torts (1979) makes the point succinctly:

> "Injunction is a flexible remedy, capable of adjustment to the peculiar needs of the plaintiff in the particular situation. It is not stereotyped. Indeed, *it is not a single remedy but an arsenal of remedies, affording both preventive and mandatory relief of an interlocutory or permanent character*." (Restatement 2d, Torts, § 938 at 573 (1979) (emphasis added).)

Congress was well aware of these principles when it passed the Sherman Act and the Clayton Act. (21 Cong. Rec. 113, 124-25, 51st Cong., 1st Sess. (March 21, 1890) (Sen. Sherman introducing S. 1, enacted as the Sherman act).) Congress was also aware of the array of remedies which the common law courts of England and the states had employed to deal with the trusts and other restraints of trade. (*Ibid.*; *Hornby v. Close*, L.R. 2 Q.B. 153, 158-59 (1867); *Farrer v. Close*, L.R. 4 Q.B. 602, 608-09 (1869) (contracts in restraint of trade void *ab initio*); *Mitchel v. Reynolds*, 1 P.Wms. 181, 190 (1711); *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 292-300 (1889).) Dissolution of these trusts was the remedy after declaring the agreements void. (*People v. Chicago Gas Trust Co.*, *supra*, 130 Ill. 268.) This was true whether the plaintiff was a state or a private party. (*Ibid.*; *West Va. Transp. Co. v. Ohio River Pipe Line Co.*, 22 W.Va. 600, 617-40 (1883).)

Indeed, this Court has recognized that independent of the powers expressly enumerated in a statute, the district courts possess inherent equitable authority to decree

effective relief. (*Hecht v. Bowles*, 321 U.S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946); *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, *supra*, 754 F.2d at 416.) This power reflects the "equity practice with a background of several hundred years of history." (*Hecht v. Bowles*, *supra*, 321 U.S. at 329.) "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity has distinguished it." (*Ibid.*)

Because "the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." (*Porter v. Warner Holding Co.*, *supra*, 328 U.S. at 399.) "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." (*Ibid.*)

As *Porter* acknowledges, Congress can and has placed restrictions on the scope of relief available under section 16. When it intends to do so, however, it does so expressly. The clearest example is found in section 20 of the Clayton Act (29 U.S.C. § 52), which restricts the power of the courts to issue injunctions affecting labor disputes. In *Duplex Co. v. Deering*, 254 U.S. 443, 471-72 (1921), the Court described this exception as follows:

> "[B]ut it must be borne in mind that the section *imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a*

restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it." (emphasis added.)

No such "special privilege" or "immunity" has been accorded to persons violating section 7 of the Clayton Act simply because they have completed their illegal acquisition.

The Ninth Circuit's decision below points to no "clear and valid legislative command" limiting the scope of injunctive relief under section 16. To the contrary, Congress confirmed the district courts' inherent equitable powers in broad, unqualified terms because only by reliance on the full remedial powers of the courts could the important objectives of the Sherman and Clayton Acts be realized.

B. Section 16 Must Be Read To Ensure The Availability Of Injunctive Remedies Necessary To Achieve The Objectives Of Section 7

Protecting consumers from the threat posed by firms amassing undue market power was the paramount concern of Congress in enacting section 7 of the Clayton Act. (*Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-97, 39 L.Ed.2d 530,

541-42, 94 S.Ct. 1186 (1974).) Its primary purpose was to arrest the trend toward economic concentration. (S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914); Kintner, *Federal Antitrust Law*, § 40.1 (1984).) This Court has repeatedly recognized that section 7 must be interpreted to prevent anticompetitive acts, including mergers, in their incipiency. (*United States v. E.I. Du Pont De Nemours & Co.*, 353 U.S. 586, 589 (1957); *Brown Shoe Co. v. United States*, *supra*, 370 U.S. 294, 311-23; see also, *Note, Section 7 of The Clayton Act: A Legislative History*, 52 Col. L. Rev. 766 (1952).) The Congress expressly identified section 7 as one of the antitrust laws private parties were encouraged to enforce under section 16 of the act. (15 U.S.C. § 26: Note, *Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986).) Thus, the overriding goal in construing section 16 must be to insure that the available remedies will effectively achieve the congressional purpose in enacting section 7. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*, 395 U.S. 100, 130-31.)

If section 16 is to carry out Congress' clear intent, it cannot be read to exclude the very remedies which are most likely to prevent the harm threatened by horizontal mergers violating section 7. (*United States v. E.I. Du Pont De Nemours & Co.*, *supra*, 366 U.S. 316, 331 (1961).) Yet that is precisely what the Ninth Circuit's no-divestiture rule does. (*International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. (IT&T)*, *supra*, 518 F.2d 913, 920 (9th Cir. 1975). As leading commentators have noted:

"To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.

"Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.*" (2 P. Areeda & D. Turner, *Antitrust Law*, 328b (1978) (emphasis added).)

The Lucky merger threatens California consumers with substantial and irreparable harm of precisely the type sections 7 and 16 of the Clayton Act were designed to prevent. (Pet.App. A at A8-A14 & A16; Pet.App. B at B24-B25.) Prior to this acquisition, Lucky was the largest and one of the most successful supermarket chains in California (ER 350-59), the acknowledged low-price leader among California's supermarket operators. (*Ibid.*) Alpha Beta was the fourth largest chain. (ER 616.) American's acquisition of Lucky will create an entity collecting one out of every four supermarket dollars spent by California consumers. (*Ibid.*)

In 53 of the 62 relevant geographic markets American and the next-largest chain will control over 50% of the volume, in one geographic market as much as 84%.

(ER 691-95, 669.)[1] This culminates a fifteen-year trend toward ever-increasing concentration that has resulted in a 50% increase in the number of geographic markets in California which are highly concentrated. (Pet. App. B at B14.) Since 1982, the relevant geographic markets suffered an average increase in concentration of more than 30%, before this merger. (*Ibid.*)

These facts led the District Court to conclude that "overwhelming statistical evidence [demonstrates] a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act." (Pet.App. B at B24.) The District Court concluded that the preliminary injunction maintaining Alpha Beta and Lucky as separate competitive entities was necessary because "if preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be

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1. These figures assume compliance with the FTC consent order. As measured by the Herfindahl-Hirschman Index (HHI), 87% of the relevant geographic markets would exceed the 1800-point definition of "highly concentrated" employed by the U.S. Department of Justice. (*U.S. Department of Justice Merger Guidelines*, 49 Fed.Reg. 26,823 (June 29, 1984) reprinted in 2 Trade Reg. Rep. ¶ 4490.) The same threshold is used by the state Attorneys General. (*National Association of Attorneys General, Horizontal Merger Guidelines* (1986) reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,405 (1987).) In one market, the post-merger HHI is 4352; in another 3224. (ER 668-69.)

The parties used different geographic market definitions resulting in differing measures of the impact of this merger. The District Court found it unnecessary to resolve that dispute because it found the effects of the merger to be substantial even assuming American's definition of the relevant geographic markets. (Pet.App. B at B11-B14.)

extremely difficult, if at all possible, to remedy effectively the unlawful merger." (Pet.App. B at B22.)

Absent express language to the contrary, section 16 must be read to permit the lower courts the use of this most natural and effective form of injunctive relief.

II.

THE NO-DIVESTITURE RULE CONFLICTS WITH THE POLICIES OF THE CLAYTON ACT

"The Sherman Act was enacted unanimously in 1890 to protect the national economy from the pernicious effects of regulation by private cartel and to vest the federal courts with jurisdiction adequate to 'exert such remedies as would fully accomplish the purposes intended.'" (*Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 649 (1977) (Stevens, J., dissenting).) However, the Sherman Act did not expressly outlaw corporate acquisitions threatening competition, nor did it provide injunctive remedies to private litigants.[2] The Clayton Act corrected both oversights.

The primary aim of section 7 of the Clayton Act was to prevent firms from acquiring or enhancing their market power by merger. (A. Fisher & R. Lande, *Efficiency*

2. The Sherman Act did, of course, create the treble-damage remedy for the primary purpose of enlisting the aid of private litigants to serve "the high purpose of enforcing the antitrust laws." (*United States v. Borden, supra*, 347 U.S. 514, 518.)

Considerations in Merger Enforcement, 71 Cal. L. Rev. 1580, 1588 (1983).) Both the Sherman Act and the Clayton Act were intended to prevent unfair transfers of wealth from consumers to firms exercising market power. (*Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1967); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-43 (1979); R. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hast. L. J. 65, 83 (1982).) The Clayton Act, in particular, "was framed largely with a view to making more effective the remedies given by the Sherman Law." (*FTC v. Gratz*, 253 U.S. 421, 434 (1920) (Brandeis, J.).) The Ninth Circuit's decision here undermines virtually all of these policies.

A. Divestiture Has Long Been Recognized As The Surest Remedy For Mergers Violating Section 7

Courts and commentators agree that divestiture is the most effective remedy for accomplishing the congressional objectives of section 7 of the Clayton Act.[3] Where a

3. *United States v. E.I Du Pont De Nemours & Co., supra*, 366 U.S. 316, 331; *Schine Chain Theaters v. United States, supra*, 334 U.S. 110, 128; *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d 404 (1st Cir. 1985); Kintner, *Federal Antitrust Law*, V:40.32, n.963 (1984); P. Areeda & D. Turner, *Antitrust Law*, § 328b (1978); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 Minn. L. Rev. (1964); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 Tex. L. Rev. 54 (1969); Note, *The Use of Divestiture in Private Antitrust Suits*, 43 Geo. L. Rev. 261 (1974); Note, *Divestiture As a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986); and Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief*, 19 Pac. L. J. 143 (1987).

merger or stock acquisition violating section 7 is already completed, divestiture is the only remedy which completely addresses the violation and its threatened injury by eliminating the increase in concentration. (*Schine Chain Theaters v. United States*, *supra*, 334 U.S. at 128.) That is why this Court has said:

> "[D]ivestiture or dissolution is an essential feature of these decrees. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act." (334 U.S. at 128-29.)

While *Schine* was a case brought under the Sherman Act, the Court reiterated the importance of divestiture to accomplish the goals of section 7 of the Clayton Act in *Du Pont*:

> "The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved . . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind

> when a violation of § 7 has been found." (366 U.S. at 328-31.)

The decision below precludes the District Court from even considering divestiture in this case in the event it ultimately determines that this merger violates section 7. Thus, the District Court will not be able to "put an end to the violation," "deprive the antitrust defendants of the benefits of their violation," or "render impotent" the monopoly power the acquisition confers on American Stores. In short, the Ninth Circuit has deprived the District Court of the power to accomplish any of the purposes this Court has found essential for section 7 relief.

B. Remedies Short of Divestiture Rarely Provide Complete Relief Against The Harm Caused By Horizontal Mergers

The Ninth Circuit has precluded the District Court from providing relief addressing the structural nature of section 7 violations -- with the additional gloss that such relief must be directed only at the "symptoms" of the violation. (Pet. App. A at A20.)[4] But whatever those

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4. The Ninth Circuit has never said what acceptable "symptomatic" relief might look like. The "symptoms" of a horizontal merger violating section 7 are 1) increased concentration and 2) the resulting increase in market power enabling the merged firm to raise prices. (Kintner, *Federal Antitrust Law*, §§ 40.1-40.4 (1984).) Without divestiture, an injunction precluding American Stores from opening new supermarkets in affected geographic markets should reduce concentration over the long run, as other firms add stores or new entrants emerge. But, there is no guarantee that this will

remedies are, they carry little hope of providing the relief necessary to prevent the harm threatened by this and other completed acquisitions violating section 7. Indeed, the experience of this Court and the lower courts with relief short of divestiture has been one of frustrating the goals underlying section 7 rather than implementing them. The simple fact is that failing to address the cause of the threatened harm cannot effectively prevent that harm from occurring. Thus, the Ninth Circuit's holding is a prescription for ineffectiveness, the reverse of the touchstone of this Court's equity jurisprudence -- effective relief.

The divestiture remedy is considered so critical to section 7 relief that this Court has on several occasions found it necessary to reverse lower court decrees which did not include divestiture of the unlawfully acquired firm or assets. In *United States v. E.I Du Pont De Nemours & Co., supra*, 366 U.S. 316, for example, the Court not only reversed a district court decree for failure to order divestiture of stock acquired in violation of section 7 of the Clayton Act, but took the unusual step of itself directing a divestiture decree. (366 U.S. at 334.)

> "It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and 'narowly

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happen. Because the success or failure of this relief depends on the actions of parties not before the court, the court cannot ensure that such an injunction would actually reduce concentration. Short of an order regulating Lucky's prices, it is difficult to imagine remedies that would prevent American Stores from raising prices, if the Lucky acquisition has conferred on it the power to do so.

> directed' [citation omitted] and it outlaws a particular form of economic control - stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy." (366 U.S. at 328-29.)

In *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), the Court found it necessary to direct the District Court to enter a decree eliminating the effects of the defendant's monopoly immediately, after earlier remedies had failed to accomplish that goal. The district court had decreed relief short of divestiture over government objections in an opinion affirmed by this Court. (*United States v. United Shoe Machinery Corp.*, 110 F.Supp. 296 (D.Mass. 1953), affd. *per curiam* 347 U.S. 521 (1954).) After the government concluded that the original decree had not restored competition to the market affected by the defendant's unlawful behavior, it requested and the district court again refused to decree divestiture of the acquired firm. (*United States v. United Shoe Mach. Corp.*, 266 F.Supp. 328 (D.Mass 1967).) This Court reversed, however, after sustaining the government's claim that the district court abused its discretion by failing to decree divestiture. (391 U.S. 244 (1968).)

The Court's experience in these cases is mirrored in many decisions of the lower courts. In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1276-77 (E.D.Pa. 1987), the Court evaluated alternatives to divestiture in a case filed prior to consummation of the acquisition as part of the determination whether preliminary injunctive relief was necessary. The Court concluded that a hold-

separate order was necessary because divestiture was the only means of insuring effective relief after trial. (*Id.*, at 1277.)

In *FTC v. PPG Industries, Inc.*, 798 F.2d 1550 (D.C.-Cir. 1986), the Court of Appeals reversed a District Court order permitting an acquisition to take place, subject to a stringent hold-separate order, on the ground that even the hold-separate order was insufficient to prevent competitive harm from occurring while the case was being tried. (798 F.2d at 1508-09.) Instead, the Court of Appeals directed the District Court to enjoin the merger. (*Id.*, at 1509.)

These cases highlight the problems with the Ninth Circuit's decision here. As in *Tasty Baking* and *PPG Industries*, the District Court here concluded that California is likely to prevail on the merits of its claim that the Lucky acquisition violates section 7 of the Clayton Act, and that the merger will cause irreparable harm if allowed to proceed unchecked. (Pet. App. B at B24-25.) Under these circumstances, the surest means of addressing the violation and preventing the antitrust injury it poses is the remedy of divestiture. (*United States v. E.I. Du Pont De Nemours & Co.*, *supra*, 366 U.S. at 331.) Yet, the Ninth Circuit's holding bars that relief or any other seeking to restore the pre-violation competitive conditions.

C. The No-Divestiture Rule Undermines The Private Action As A Mechanism To Enforce Section 7

Section 7 of the Clayton Act outlaws mergers which may tend to substantially lessen competition. (15 U.S.C.

§ 18.) Sections 15 and 16 of the Clayton Act empower the courts to prevent or restrain violations of section 7 at the request of the government or private parties, respectively. (15 U.S.C. §§ 25, 26.) To increase the governments' ability to prevent violations of section 7, the Hart-Scott-Rodino Act (HSR) (15 U.S.C. § 18a) was enacted to provide the government with information about the competitive effects of the largest mergers before they occur. (*H.Rep. No. 94-1373*, 94th Cong., 2d Sess. 11, *reprinted* in 1976 U.S. Code Cong. & Admin. News 2637 ("H.Rep. No. 94-1373").) The intent of Congress was to create a comprehensive enforcement scheme relying on complementary efforts of the government and its citizens. (*Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 130-31.) The decision below undermines the congressional purpose of insuring the effectiveness of the private action. (*Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").)

Section 16 was designed to ensure that private parties could fill gaps in the federal antitrust enforcement effort. (*Reiter v. Sonotone Corp.*, *supra*, 442 U.S. 330, 344; *United States v. Borden*, 347 U.S. 514, 518-19 (1954) ("These private and public-actions were designed to be cumulative, not mutually exclusive."); *Lieberman v. F.T.C.*, 771 F.2d 32, 33 (2d Cir. 1985); *Arvin Industries, Inc. v. Maremont Corp.*, (S.D.Ind.) 1973 Trade Cases ¶74,416.) This Court has long recognized the appropriate role that

state attorneys general play in antitrust enforcement.[5] (*Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439, 447 (1945); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 259 (1972).) And the Congress has reiterated its views of the importance of actions brought under section 16 by specifically amending that section to provide attorneys' fees to prevailing plaintiffs, including state plaintiffs, for the express purpose of making such actions more attractive. (*H.Rep. No. 94-499, 94th Cong., 2d Sess.* 20, *reprinted in* 1976 U.S. Cong. & Admin. News 2572, 2589-90.)[6]

The HSR Act while improving the federal agencies' abilities to enforce section 7 with its premerger review

5. One of the great ironies of this case is the fact that a sovereign State acting in its *parens patriae* capacity is considered a "private" party under section 16. The State of California shares none of the characteristics which have led some courts to note that private litigants acting in the role of "private attorney general" often promote their "private" aims over those of the public interest. (*Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 11 (2d Cir. 1981).)

6. Significantly, the House Judiciary Committee Report to the Congress concerning this amendment to section 16 noted:

> "In addition to private parties, States would be entitled to recover reasonable attorneys fees whenever they prevail in §16 cases." (*Id.*, at 2590.)

Clearly, Congress knew that section 7 was one of the provisions of the Clayton Act it was encouraging states to enforce by providing attorneys fees to them should they prevail in cases brought under section 16. It is not credible to assume that the Congress was encouraging states to bring cases which it understood could not result in effective relief.

provisions, was not intended to supplant the coordinate role Congress clearly envisioned for the private action. (*Lieberman v. FTC, supra*, 771 F.2d 32, 37 (2d Cir. 1985); *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 130-31.) The HSR Act itself created certain gaps in the enforcement scheme created by Congress because its threshold provisions were enacted with the knowledge that many mergers raising section 7 concerns would escape premerger review. (*H.Rep. No. 94-1373* at 11.) Moreover, parties can and do structure transactions to avoid the reporting requirements of the HSR Act. (*FTC v. Illinois Cereal Mills, Inc.*, 691 F.2d 1131 (N.D.Ill. 1988).) Filling these gaps is precisely the role Congress intended for section 16 and state attorneys general have consistently tried to carry out that congressional goal.

1. *The No-Divestiture Rule Leaves Important Gaps In the Enforcement Of The Antitrust Laws*

The federal enforcement agencies engage in HSR Act premerger reviews only with respect to mergers meeting the threshold requirements of that act.[7] (15

7. From 1979 through 1987, the two federal agencies conducted HSR reviews of transactions totalling only 55% of the number of mergers and acquisitions which actually occurred. (Compare, *Mergerstat Review 1988*, W.T.Grim & Co. (1989) at 117 (hereafter "*Mergerstat Review*") with Federal Trade Commission, *Tenth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1986, Pub. L. 94-435 ("Tenth Annual Report")*, Appendix A (1988).) Since the HSR Act requires certain transactions to be reported which are not either a merger or an acquisition, e.g., certain stock acquisitions of less than a majority interest, it is clear that even a smaller percentage of mergers is actually reviewed by the Antitrust Division or the FTC.

U.S.C. § 18 (b).) Congress knew that it was leaving open the possibility that "smaller, illegal mergers may still be consummated . . . and there may still be lengthy divestiture trials in future years." (*H.Rep. 94-1373, supra*, at 11.) The HSR Act was seen only as "a step in the right direction." (*Ibid.*) To the extent that such mergers escape the attention of the Antitrust Division and the FTC, the private action was intended to provide the primary source of potential relief from the anticompetitive consequences of such mergers.

The likelihood that the federal enforcement agencies would challenge a merger under section 7 that does not meet the thresholds of the HSR Act is quite low due to their limited resources and the existing burden of dealing with their premerger review obligations. Thus, particularly as standing or other jurisprudential limits on the ability of competing firms or target firms to challenge such mergers expand, the need for private actions by consumers and their representatives, such as state attorneys general, to serve as a check against such mergers increases.[8] (See, *Monfort of Colorado, Inc. v.*

8. The states have been vigorous in their response to this need. (E.g., *State of Texas v. Coca Cola Bottling Co. of Southwest Texas*, 697 S.W.2d 677 (1985) (state action to divest acquisition violating state law counterpart to § 7 of the Clayton Act where no prior HSR review by federal agencies); *State of Texas v. Gearhart Industries, Inc. Halliburton Company and Halliburton Acquisition Co.*, No. 88-49584 (127th Judicial District, Harris County) (state law challenge to action after DOJ HSR review resulted in no action); *Maine v. Connors Ltd.*, No. CV-88-318 (Maine Super. Ct., Kennebec County), 55 Antitrust & Trade Reg. Rep. (BNA) 524 (Sept. 29, 1988) (state law action where HSR thresholds not met resulting in divestiture consent agreement); *New York v. Transit-Mix Concrete Corp.*, 84 Civ. 4194

Cargill, Inc., 479 U.S. 104, 107 (1986); Note, *Competitor Standing to Challenge a Merger of Rivals: The Applicability of Strategic Behavior Analysis*, 75 Cal. L. Rev. 2057 (1987).)

When it passed the HSR Act, Congress was also aware that transactions could be structured to avoid its requirements. That is why Congress provided substantial civil penalties as sanctions for failing to comply with the act's reporting requirements. (15 U.S.C. § 18a (g).) Experience under the act shows that parties can and do attempt to avoid the reporting obligation for the purpose of "sneaking" their mergers through without antitrust scrutiny. (*F.T.C. v. Illinois Cereal Mills, Inc., supra,* 691 F.Supp. 1131, 1146-47; cf. *Koppers Co., Inc. v. American Exp. Co.*, 689 F.Supp. 1371 (1988); *USG Corp. v. Wagner & Brown*, 689 F.Supp. 1483 (N.D.Ill. 1988).) In such cases, the private action could and should serve as a deterrent to such unlawful behavior. But the Ninth Circuit's no-divestiture rule lets firms violating the HSR Act keep the spoils of their intentionally illegal acts.

(S.D.N.Y.) (state action under Clayton Act seeking divestiture and dissolution of local concrete monopoly where no prior HSR review); *City of Pittsburgh v. May Department Stores Co.*, 1986-2 Trade Cases (CCH) ¶ 67,304 (W.D.Pa. 1986) (state and city action resulting in divestiture of local store following FTC no action decision).) Under the Ninth Circuit's no-divestiture rule, the states would be foreclosed from effective relief in these actions.

2. *The Federal Enforcement Agencies Are Being Overwhelmed By Their HSR Act Premerger Review Responsibility*

The Ninth Circuit's decisions below and in *IT&T* preclude private litigants and state Attorneys General from effectively enforcing section 7 of the Clayton Act. This effect of its ruling is especially harmful because the federal enforcement agencies are increasingly unable to provide consumers with the protection they need due to the flood of merger activity overwhelming their limited resources. Thus, the congressional aim to have private litigants supplement the federal enforcement effort is frustrated by the Ninth Circuit's holding at the worst possible time.

The number of transactions requiring HSR review is increasing at an alarming pace,[9] as is the number of mergers and hostile tender offers.[10] At the same time, the percentage of mergers challenged by the federal

9. In 1987, the number of transactions reported (2533) increased by 30% over the number reported in 1986 (1949), which in turn represented a 22% increase over the number reported in 1985 (1603). (*Tenth Annual Report* at 4.)

10. The total dollar-volume of all mergers increased more than ten-fold between 1976 and 1988. (*Mergerstat Review, supra*, at 117.) In 1976 the dollar-volume of all reported acquisitions was approximately $20 billion. (*Ibid.*) By 1988, the figure had climbed to almost $250 billion. (*Ibid.*) The number of hostile takeovers tripled. (*Mergerstat Review* at 85.)

enforcement agencies has fallen precipitously.[11] This is, in part, attributable to the steep decline in the resources available to the Department of Justice and the FTC.[12]

The response of the Justice Department and the FTC to the pincer-like pressure created by the decrease in funding and increase in workload has been to modify the HSR reporting regulations, reducing both the number of transactions requiring HSR review and the amount of information received regarding those transactions. (*Tenth Annual Report*, at 5-7.) In this way, it is hoped that "the burden of the premerger notification program" can be reduced. (*Id.*, at 6.) In light of these trends, the number of mergers raising section 7 concerns which are not

11. The two enforcement agencies took action, either initiating suits or announcing their intent to do so, in 15 cases in 1987, approximately .5% of all reported transactions. (*Tenth Annual Report* at 15-20.) This represents a 50% decrease in the percentage of mergers the federal enforcement agencies were able to challenge as recently as 1979, with no evidence that the number of mergers raising section 7 concerns decreased.

12. Between 1980 and 1986, the Antitrust Division's budget declined by 30% in constant dollars (*House Oversight Hearings* at 145), while the number of attorneys declined by 40%. (*Ibid.*) The figures for the FTC are comparable. The Commission's budget declined by 32% in constant dollars (1982) between 1976 and 1988. (Compare, *Budget of the United States, 1990* at 9-168, Office of Management and Budget, Wash. D.C., (1989) with *Budget of the United States, 1978* at 343, Office of Management and Budget (1977).) The number of full-time permanent positions authorized for the Commission declined by more than 43% between 1976 and 1988, from 1638 to 922. (Compare, *Budget of the United States, 1990* Appendix I at 242 with *Budget of the United States, 1978* Appendix at 734.) Further cuts in staffing were implemented for the 1989 and 1990 fiscal years. (Budget of the United States, 1990 Appendix I.)

challenged by either the Antitrust Division or the FTC will inevitably increase.

Another byproduct of the increasing federal workload under the HSR is the greater reliance placed on administrative consent agreements such as the one entered in this case.[13] While the Antitrust Penalties and Procedures Act ("APPA") (15 U.S.C. § 16 (b)-(h)), provides for judicial review of consent agreements entered into by the Department of Justice, section 16 is the only mechanism for reviewing consent agreements entered into by the Commission. Unless divestiture is available under section 16, private litigants and the courts will be deprived of the opportunity to secure the most effective relief by non-reviewable Commission action. As the District Court's findings in this case show, that result poses genuine difficulties for courts whose mandate under section 16 is to provide effective relief "'conditioned by the necessities of the public interest which Congress has sought to protect.'" (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).)

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13. California is not suggesting that this policy is inappropriate. Prosecuting agencies need practices designed both to encourage settlement and preserve relief in the event settlement discussions break down. This is especially true in the case of hostile tender offers. The HSR Act waiting period, 15 U.S.C. § 18a (b), was designed to coordinate with the waiting period of the Williams Act, 15 U.S.C. §§ 78l(i),78m(d), (e), 78n(d) to (f). The Commission's consent agreement regulations serve to protect the interests Congress sought to protect in that Act as well. But the policy interferes with antitrust enforcement due to the no-divestiture rule and the increase in merger activity.

In short, the gap between merger activity and the ability of the federal enforcement agencies to enforce section 7 of the Clayton Act highlights the need for effective remedies in private actions, because the private action will have to play an increasing role if Congress' vision of a coordinated and effective enforcement program is to be achieved.

This case shows how the private action could supplement effectively the federal enforcement agencies' merger program but for impact of the no-divestiture rule. California informed the FTC that it believed the tentative consent agreement negotiated between its staff and American Stores was inadequate to remedy the competitive concerns raised by this merger. (Pet. App. B at B23.) In its comments, California presented substantial evidence to the Commission that the merger would dramatically increase concentration and threaten increased prices, notwithstanding the relief proposed by the tentative consent agreement. Accordingly, California recommended that the Commission withdraw its consent and seek to block the merger completely. (Pet. App. B at B23.) When the Commission approved the consent order unchanged by any of the public comments, this suit was filed the next day. (*Ibid.*) Both lower courts agreed that the evidence presented by California shows a likelihood that this merger, even with the Commission's consent order, violates section 7 of the Clayton Act. (Pet. App. A at A8-15; Pet. App. B at B24-25.)

California's experience in this case is not unique.[14] Other private parties have found it necessary to file under section 16 in order to obtain relief to remedy violations of section 7, notwithstanding the HSR review process. *State of Texas v. Gearhart Industries, Inc., Halliburton Company and Halliburton Acquisition Co., supra*, No. 88-49584 (127th Judicial District, Harris County); *City of Pittsburgh v May Department Stores Co., supra*, 1986-2 Trade Cases (CCH) ¶ 67,304 (W.D.Pa. 1986). Likewise, private litigants are often able to obtain modification of consent agreements negotiated by the Antitrust Division under the judicial review provisions of the APPA. (E.g., *United States v. BNS, Inc.*, 858 F.2d 456 (9th Cir. 1988); *United Sates v. Western Elec. Co., Inc.* 797 F.2d 1082, 1085 (D.C. Cir. 1986).) But the APPA applies to the Commission only when it seeks to settle cases it initiated in the district courts, and that is a rare occurrence. The Commission settles most of its merger cases by administrative consent agreement, so judicial review under the APPA will not occur.

In the great majority of circumstances then, section 16 of the Clayton Act provides the only avenue for private parties to challenge and for district courts to review, the effectiveness of the remedy secured by the Commisssion's consent agreement. (Cf., *United States v. Borden Co.*,

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14. Although not unique, California's concerns are acute. California is the merger capital of the United States. More firms headquartered in California have been acquisition targets than in any other state in every year since 1984. (*Mergerstat Review* at 110.) The number of California firms purchased by acquisition was more than 50% greater than the number two state (New York) during those years. (*Ibid.*)

supra, 347 U.S. 514; *Arvin Industries, Inc. v. Maremont Corp.*, (S.D.Ind. 1973 Trade Cases ¶ 74,416.) Without the divestiture remedy, the courts will be deprived of the ability under section 16 to order the relief that might be necessary to address the concerns raised by mergers violating section 7. In effect, the Antitrust Division and the FTC will have become the final arbiters of which mergers violating the Clayton Act require effective relief, whereas the Congress placed that responsibility squarely on the shoulders of the courts. (15 U.S.C. § 25.)

D. The Ninth Circuit Rule Undermines The Coordination Between Federal And Private Enforcement Efforts Congress Intended Under Section 7 Of The Clayton Act

Congress intended the private action and the federal enforcement program to serve complementary roles in enforcing section 7 of the Clayton Act. (*United States v. Borden, supra*, at 518-19.) Congress intended for private actions to serve as a check on, and fill gaps in, the federal enforcement efforts. (Cf. *Lieberman v. FTC, supra,* 771 F.2d at 33.) By the same token, however, Congress intended that private actions would supplement the federal program, not replace it. Yet, the Ninth Circuit's holding below will have just that perverse effect, since it forces private litigants to ignore the HSR premerger review to insure their right to effective relief. (Pet.App. A at A20-21.)

To the extent that the HSR review process effectively blocks anticompetitive mergers, federal policy and common sense suggest that it should be the principal

screen for such mergers. Litigation by either of the federal antitrust agencies, or by private litigants, is far more costly and disruptive to both the parties' resources and those of the courts. The no-divestiture rule, however, forces litigants to choose between the risk of not securing effective relief against threatened injury and the expense of initiating suit before mergers are completed. In most cases, that will not be a real choice -- private litigants will have to sue early, because the HSR review process results in such a small percentage of court actions. Thus, the no-divestiture rule can be expected to result in precipitous filings of section 7 cases, forcing district courts to duplicate the HSR review process being undertaken by the enforcement agencies.[15]

Both lower courts here recognized this problem. The District Court concluded that California had chosen the more responsible course by awaiting the results of the Commission's HSR review in the hope that it would resolve the competitive concerns raised by the Lucky acquisition. (Pet.App. B at B23-B24.) The Ninth Circuit ignored that finding and opined that California could have and should have sued earlier. (Pet.App. A at A20-A21.) That conclusion ignores the practical reality of meeting the burden of proof for a preliminary injunction in a section 7 case. Addressing the reality of that burden in government cases was, of course, the whole point of the

15. Another unfortunate aspect of this result is that private litigants may be forced to sue before they can thoroughly examine the real risk of antitrust injury posed by any particular merger. This is especially true in the case of tender offers, where the time frame for action is very short.

HSR Act. Forcing private litigants to forego the benefits of that act at the risk of losing the possibility of effective relief serves no antitrust purpose.

III.

THE LEGISLATIVE HISTORY OF SECTION 16 DOES NOT JUSTIFY THE NO-DIVESTITURE RULE

Despite the overwhelming evidence from the language and purpose of section 16 of the congressional intent to provide private parties with a divestiture remedy, the Ninth Circuit concluded that section 16 did not include such a remedy based on its analysis of excerpts from the legislative history of the Clayton Act. (*IT&T, supra*, at 920-26.) Significantly, the First Circuit reached the opposite conclusion -- that divestiture is a permissible remedy -- after an exhaustive analysis of that same history. (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d at 413-30.) Not only is the First Circuit's reasoning more persuasive, but its conclusion is buttressed by confirming evidence, apparently not presented to either court of appeals, that Congress intended to grant private litigants the very same injunctive remedies in section 16 it had given to the government in section 15 of the Act.[16]

16. Neither the First Circuit nor the Ninth Circuit considered this part of the floor debates in their opinions. Senators Shields and Nelson were sponsors of HR 15657 in the Senate. These excerpts occurred during debates in the Senate sitting as a Committee of the Whole. (51 Cong. Rec. 14100, Aug. 25, 1914.)

Shortly before passage of the Clayton Act, the following exchange occurred on the Senate floor between sponsors of the bill explaining its provisions to the full Senate:

> Mr. SHIELDS. I trust that the Senator will give attention to the provisions relating to injunctions when we reach those sections.
>
> . . . .
>
> Mr. NELSON. I desire to call to the attention of the Senator from Tennessee, . . . to the fact that under the original antitrust act of 1890 only the Government, through its Attorney General and the district attorneys, can obtain injunctive relief. By section 14 [enacted as section 16] of this bill for the first time the same remedy is given to private parties as was given to the Government under the antitrust laws. If that is the case, if private parties are to be given the same relief by injunctive process under the antitrust law as is the Government, why should they not have the same remedies in respect to contempt as the Government of the United States has under like circumstances?
>
> Mr. SHIELDS. I think all parties should have the same protection from the courts of the country. (51 Cong. Rec. 14214, Aug. 25, 1914.)

Senator Shields went on to provide the Senate with a section by section analysis of the proposed Clayton Act and as to the private injunction remedy, noted:

> "Section [16] authorizes persons and corporations to bring suits in equity against those violating the antitrust laws in all things, as section 4 of the Sherman Law authorizes the Government to do so." (51 Cong. Rec. 14215, Aug. 25, 1914.)

Significantly, section 4 of the original Sherman Act was reenacted as section 15 of the Clayton Act. Thus, Sen. Shields' recognition that Congress intended to give private litigants the same remedy found in section 4 of the Sherman Act disposes of the argument that the minor differences between the language of sections 15 and 16, support a no-divestiture rule. (See, e.g., *Respondent's Brief In Opposition*, filed in this case on September 20, 1989, at 19.)

Against these unequivocal descriptions of the Congressional intent, the Ninth Circuit concluded that differences between the phrases "dissolution", "divorcement", "divestiture", and "injunctive relief," coupled with the remarks of one Congressman during the first week of hearings on the Clayton Act, were dispositive of Congress' intent not to permit private litigants the divestiture remedy.[17] (*IT&T*, *supra*, 518 F.2d at 922-24.) By contrast, the First Circuit concluded that no definitive indications of congressional intent could be drawn from the legislative

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17. The Ninth Circuit reasoned that the term "dissolution" was broader than and included the term "divestiture." (*IT&T, supra*, at 922-23.) It argued that both terms described relief distinct from "injunctive relief." (*IT&T, supra*, at 922.) From these premises, the court concluded that Congress would have used a broader term than "injunctive relief" if it had intended to grant private parties the right to seek divestiture. (*Ibid.*)

history on that score. (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra,* 754 F.2d at 419-422.)

The Ninth Circuit placed great weight on the following remark of Rep. Floyd concerning the intent of the subcommittee which drafted HR 15657:

> "We did not intend by section [16] to give the individual the same power to dissolve the corporation that the Government has . . . . We discussed it very thoroughly among ourselves and decided he should not have [it]." (H. Hearings on HR 15567, 63rd Cong., 2d Sess. 842 (February 6, 1914).)

However, having failed to mention the clear statements of Sens. Nelson and Shields during the floor debates in the Senate which occurred later, the Ninth Circuit's dispositive treatment of Rep. Floyd's remarks are suspect.[18] Later references to inquiries by other

18. This is particularly so because Rep. Floyd's remarks occurred at the outset of the hearing process and months before the draft of H.R. 15657 was even reported out of the Judiciary Committee of the House on May 16, 1914. (*H. Rept. No. 627*, 63rd Cong., 2d Sess. (1914).) The version of the bill that was ultimately passed by the House was then substantially amended by the Senate. (Compare H.R. 15567 approved by the House on June 5, 1914 with H.R. 15567 approved by the Senate on September 2, 1914.) The Congressional Record reports no mention of Rep. Floyd's early view in any of the debates in either the House or the Senate. It is well-established that casual remarks of a single legislator occurring during the hearing process are entitled to little weight. (See *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d at 425; *Duplex Co. v. Deering, supra*, 254 U.S. 443, 474 (interpreting §§ 1 & 20 of the Clayton Act); *Aldridge v. Williams*, 3 How. 9, 24 (1845); *United*

committee members during the House hearings regarding whether individuals should be given the right to obtain the dissolution of an offending corporation cast even greater doubt on the Ninth Circuit's conclusion. (See, e.g. House Hearings at 492 (February 12, 1914); *id.*, at 666 (Feb. 16); *id.*, at 1183 (March 4); see also, 754 F.2d at 425-28.) In the words of Areeda & Turner:

> "That fragment of legislative history cannot bear the weight the court placed upon it [in *IT&T*], when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." (2 P. Areeda & D. Turner, Antitrust Law, 328b (1978).)[19]

At worst, the legislative history of section 16 is inconclusive on whether Congress intended to afford private litigants the remedy of divestiture. At best, it shows Congress' intent to allow private parties the same remedies as the Government. In light of the unqualified language of section 16, coupled with the important role divestiture plays in achieving the purposes of the Sherman and Clayton Acts, this Court should reject the Ninth

States v. Union Pacific R.R. Co., 91 U.S. 72, 79; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 318.)

19. But the floor debates in the Senate *did* contain unequivocal statements of the intent to provide private litigants with the same remedies available to the government. (See note 16 and accompanying text, *supra*.) The Court should thus reject the Ninth Circuit's no-divestiture rule as inconsistent with the legislative history of the Clayton Act.

Circuit's holding that section 16 does not authorize district courts to utilize the most effective relief available to remedy violations of section 7 of the Clayton Act.

CONCLUSION

The decision below threatens to render the private action a dead letter in enforcing section 7 of the Clayton Act. That is wholly inconsistent with the plain language of section 16, the purpose of section 16 and its legislative history. Because the Court of Appeals' holding lacks doctrinal support and threatens California consumers with irreparable injury, the decision below should be reversed.

Respectfully submitted,

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COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 17, 1989, I served the within Brief for the Petitioner in re: "State of California -v- American Stores Co. Alpha Beta acquisition" in the United States Supreme Court, October Term 1989 No. 89-258, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 1989, at Los Angeles, California.

Donna R. Rodgers

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether section 16 of the Clayton Act permits an antitrust plaintiff other than the federal government to seek mandatory relief, such as divestiture, to remedy claimed injuries caused by a completed acquisition that allegedly violated section 7 of the Clayton Act.

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STATEMENT OF THE CASE

1. American Stores Co. ("American") is a nationwide grocery retailer. Prior to June 1988, it owned and operated 252 "Alpha Beta" and "Skaggs Alpha Beta" retail grocery stores in California. On March 21, 1988, American publicly announced a $2.5 billion tender offer for the outstanding shares of another nationwide grocery chain, Lucky Stores, Inc. ("Lucky"). At that time, Lucky operated 340 "Lucky Stores" and "Lucky Food Basket" stores in California. American's purpose in acquiring Lucky was to bring its Alpha Beta stores under the Lucky banner and to obtain the substantial cost-saving efficiencies that integration of the two chains would provide. American estimated that this integration would produce shelf price reductions to consumers of $50 million annually. Excerpts of Record ("ER") 393-94.

Immediately after its announcement, American began supplying information to the Federal Trade Commission (FTC) under the Hart-Scott-Rodino ("HSR") Act (15 U.S.C. § 18a), and the FTC's HSR regulations (16 C.F.R. § 801 *et seq.*). On May 31, 1988, after protracted negotiations with the FTC, American entered into a comprehensive consent order. Among other things, it agreed to divest 37 stores in California, dispose of all its Midwest assets, and avoid additional acquisitions in certain parts of California for ten years. To provide time to accomplish these divestitures without postponing consummation of American's cash tender offer, American simultaneously entered into a "hold separate" agreement with the FTC. That agreement required American to operate Lucky as a separate business until the consent decree finally was approved and the divestitures accomplished. This hold separate agreement was explicitly drawn to preserve the FTC's power, as a federal antitrust enforcement agency, to seek divestiture if it should determine not to accept the consent decree or proposed divestitures after public comment. ER 19-20.

On June 2, 1988, American accepted for payment all of the Lucky shares tendered pursuant to American's tender

offer. ER 596. On June 9, American completed its acquisition of Lucky's stock and assets through a short-form merger under Delaware law. Pet. App. A-7; ER 596; Pet. Br. 5. The merger therefore was completed on that date. The FTC gave final approval to the consent agreement on August 31, 1988, after receipt and review of public comments during a 60-day public comment period.

Among those filing public comments was the California Attorney General ("CAG"), which had begun its own investigation of the merger. American had cooperated fully with the CAG during this entire period. Among other things, American furnished the CAG with all the California documents and information it provided to the FTC, and kept the CAG fully informed of the status of the FTC proceedings. Despite several requests, the CAG declined to inform American of his enforcement intentions. ER 596. Nearly three months after American completed the merger by paying $2.5 billion to Lucky shareholders and five months after the beginning of the tender offer, the CAG commenced an antitrust action in the United States District Court for the Central District of California. The suit, which was brought under section 16 of the Clayton Act (15 U.S.C. § 26), alleged that the merger violated section 1 of the Sherman Act as well as section 7 of the Clayton Act. It sought an order requiring American to divest all Lucky stores located in California. Pet. App. A7.

2. After granting the CAG's motion for a temporary restraining order, the district court held a hearing (based entirely upon written testimony) to determine whether a preliminary injunction should issue. In establishing the relevant product market, respondents presented extensive evidence that their grocery retailers faced substantial competition from "mom and pop" retail grocery stores, convenience food stores, warehouse food stores and other grocery vendors in addition to other large national and regional supermarkets. Pet. App. A10. Indeed, respondents demonstrated that less than two-thirds of food

sold for home consumption in California is sold through supermarkets. ER 203, 610. Respondents also proposed 14 individual Metropolitan Statistical Areas as the relevant geographic markets. Based upon these product and geographic market definitions, the combined American/Lucky grocery chains had a market share averaging approximately 19 percent in these 14 markets, *before* divestiture of the 37 stores respondents were required to sell under their agreement with the FTC. ER 114-28. Respondents also presented extensive evidence showing that entry into the grocery retailing business is easy and that such entry would occur swiftly if any grocery chain attempted to raise its prices above competitive levels. Pet. App. A13-A14.

Although the district court accepted respondents' definition of the relevant geographic markets (Pet. App. B11), it rejected respondents' definition of the product market. Instead, it adopted the CAG's definition of the product market, which included *only* large, full-line "supermarkets" that operated in more than 10,000 square feet of building space. Pet. App. B10, A10. This definition was based solely upon the written testimony of the State's two economists, one of whom admittedly had never reviewed any of the market-specific data submitted to the CAG. ER 994. Even under this narrow definition of the market, the market share of the combined American/Lucky chain averaged just 24 percent over the 14 geographic markets accepted by the court. Pet. App. A11, B12. The district court also rejected respondent's showing of low entry barriers. Pet. App. B17; cf. ER 213-14, 611, 658.

Based largely on its interpretation of the Justice Department's merger guidelines (which the FTC presumably applied in approving the consent decree), the district court held that the statistical evidence created a presumption that the merger violated section 7 of the Clayton Act. Pet. App. B12-B14. Respondents' evidence concerning ease of entry was rejected because it was incon-

sistent with the court's own narrow definition of the relevant product market. Pet. App. B17-B18. The district court therefore concluded that the CAG had established a likelihood of prevailing on the merits of its Clayton Act claim. Pet. App. B17-B19.[1] With respect to the requirement of irreparable harm, the district court stated that, because the CAG had shown the possibility of an adverse effect on competition, the CAG had made an "adequate" showing of irreparable injury justifying preliminary injunctive relief. Pet. App. B22. Accordingly, the district court on September 29, 1988, entered a preliminary injunction very similar to the FTC's hold separate order.[2] The court further held that such an injunction was justified because (a) the FTC's hold separate order had prevented completion of the merger, and (b) an order making this injunction permanent would not constitute a divestiture order. Pet. App. B21.[3]

3. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A21. Contrary to petitioner's assertion (Pet. Br. 7), the court of appeals did not "adopt" the district court's findings of fact. Instead, the court of appeals emphasized that its review of the district court's preliminary injunction order was limited to a determination whether the district court had abused its discretion, and the court simply declined to disturb

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[1] The court did not address petitioner's Sherman Act section 1 claim.

[2] The order required respondents to "take all steps necessary to operate" Alpha Beta "independently of the assets and businesses" of Lucky in the State of California and to "refrain from taking any further steps" to "integrate the assets and businesses" of those two wholly-owned subsidiaries. Pet. App. B25.

[3] Compliance with the injunction during the course of this litigation has been extremely costly, in part because the FTC consent decree required American to divest itself of so many Alpha Beta stores that the remaining stores had difficulty supporting a separate distribution, marketing and advertising operation.

the district court's preliminary findings as to the likelihood of success. Pet. App. A7-A9. But, after reviewing respondents' evidence as to the relevant product market, the court of appeals noted that, "Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion." Pet. App. A10. It further stated that, after all the evidence is presented at trial, the district court itself might "come to a different view of the market." *Id.* The court of appeals also found that respondents had made "a compelling case for the easy entry into the market" (*id.* at A13), but it nevertheless declined to hold that the district court was "clearly erroneous" in its determination that American had "not satisfied its burden." *Id.* at A13-A14.

Although it declined to disturb the district court's preliminary factual findings, the court of appeals held that the district court had misapprehended both the law of divestiture and the law of corporate mergers. The court reiterated its 14-year-old rule that, unlike a suit brought by the United States under Section 15 of the Clayton Act (15 U.S.C. § 25), a suit brought by a non-federal plaintiff under section 16 of the Clayton Act may not seek divestiture. Pet. App. A17-A18; see *International Tel. & Tel. Corp.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (*IT&T*); *Bosse* v. *Crowell Collier & MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977) (*Bosse*); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.) (*Calnetics*), *cert. denied*, 429 U.S. 940 (1976). The court further held that, under Delaware law, the merger had been completed on June 9, 1988, when American acquired the remainder of Lucky's outstanding shares. Pet. App. A19. Thus, the only way to "undo" the merger was through divestiture. *Id.*

The court of appeals held (and petitioner concedes, Pet. Br. 7-8) that the sole purpose of the preliminary injunction order was to preserve the possibility of a

final order of divestiture following trial. Pet. App. A19-A20. Because the district court lacked authority in a lawsuit brought under section 16 to issue a permanent order of divestiture, the issuance of a preliminary injunction designed solely to preserve the right to such relief was an abuse of discretion. Pet. App. A20.[4]

Finally, the court of appeals rejected petitioner's argument that denying it the ability to obtain divestiture would make it difficult or impossible to obtain meaningful relief in merger cases. The court stated:

> We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice.

Pet. A20-A21.

SUMMARY OF ARGUMENT

This case presents a single, narrow question of statutory construction: whether section 16 of the Clayton Act grants plaintiffs other than the federal government the authority to seek divestiture of a business acquired through a merger, allegedly in violation of section 7 of

[4] The court of appeals correctly held that "there must be some reasonable relationship between the preliminary injunction and the permanent relief requested: the preliminary relief granted should ensure the availability of permissible permanent relief sought." Pet. App. A20.

The court of appeals also held, as an alternative ground for its decision, that the preliminary injunction, in and of itself, improperly imposed "indirect" divestiture because it required American and Lucky to "operate as if Lucky had never been acquired by American Stores at all." Pet. A19, citing *IT&T*, 518 F.2d at 924. The court concluded that entry of any injunction effectively extending the life of the FTC's "hold separate" order improperly permitted California to "bootstrap itself into th[e] remedy" of "divestiture" through a "consent order designed to protect the rights of the FTC, which is entitled to sue for divestiture [under section 15 of the Clayton Act]." Pet. App. A20.

that Act. See Pet. Br. i.[5] Relying almost entirely upon its view of proper antitrust policy, and citing a single snippet of legislative history, petitioner argues that section 16 grants to private plaintiffs (including state attorneys general) the full range of equitable remedies available to the federal government under section 15 of the Clayton Act, including the power to "undo" (Pet. Br. 16) a merger through relief that "address[es] the structured nature of section 7 violations" (Pet. Br. 21).

This argument is belied by the plain language of the Clayton Act. By its terms, section 15 of that Act permits the federal government, without qualification, to institute any "proceeding in equity" and, therefore, to seek any kind of equitable relief. 15 U.S.C. § 25. The language of section 16, by contrast, limits the equiable relief available to a plaintiff other than the federal government to "injunctive relief against threatened loss or damage by a violation of the antitrust laws," and requires that such relief be granted only "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. Petitioner's attempt to equate the two provisions violates the well-established principle that when Congress uses different language in parallel provisions of the same statute, it intends those provisions to have different meanings. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Petitioner's argument also violates another well-established principle of statutory construction by rendering superfluous the phrases "against threatened loss or damage" and "against threatened conduct that will cause

[5] Petitioner does not challenge any other aspect of the court of appeals' decision. It does not, for example, challenge the court of appeals' conclusion that under Delaware law the merger at issue here was completed on June 9, 1988. And it does not challenge the court of appeals' holding that it was an abuse of discretion for the district court to enter a preliminary injunction designed to preserve the possibility of permanent relief that is legally unavailable. See *supra* at 5-6 & n.4.

loss or damage." *E.g.*, *Mountain States Tel. & Tel.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 248-49 (1985); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Petitioner never has explained how such different language in adjacent sections of the Act reasonably can be interpreted to have precisely the same meaning.

In fact, section 16's meaning becomes crystal clear in light of the equity jurisprudence that was well established in 1914, and which section 16 expressly invokes. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). An analysis of the statutory language in light of relevant equitable principles reveals that the phrases "threatened loss or damage" and "threatened conduct that will cause loss or damage" were designed to (and did) limit the relief available under section 16 to "prohibitory" injunctions. The language thereby excludes "mandatory" or "affirmative" equitable relief, *i.e.*, relief designed to "undo" violations after the fact. Because divestiture—the "undoing" of a merger—is the classic example of mandatory relief, it falls outside the scope of section 16.

This reading of section 16's plain language is confirmed by a number of court decisions interpreting that provision shortly after its enactment. No less than three decisions issued by this Court within the first eight years after passage of the Clayton Act construed the plain language of section 16 to be so limited. *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29 (1916); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921); *General Investment Co.* v. *Lake Shore & Mi. S. R. Co.*, 260 U.S. 261, 286 (1922). And, during the first twelve years after the Act's passage, all three lower-court decisions that addressed the precise issue presented in this case—including a decision by Judge Learned Hand— held that divestiture is not available to non-federal plaintiffs because section 16 authorizes only prohibitory injunctions. *Venner* v. *Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918); *Graves* v. *Cambria Steel Co.*, 298 F. 761, 762 (D.N.Y. 1924) (L. Hand, J.); Continental

Securities Co. v. *Michigan Cent. R.R. Co.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927). This consistency among contemporaneous judicial interpretations convincingly confirms Congress's meaning and intent in enacting section 16.

That section 16 is limited to prohibitory injunctive relief is also confirmed repeatedly in the legislative history of the Clayton Act. Numerous legislators, as well as several witnesses (including Louis Brandeis) who testified on the proposed bill, stated that section 16 would not and should not permit a private plaintiff to sue for dissolution of a monopoly, either by divestiture of its component parts or otherwise. And one of the drafters of the Act stated that the drafting committee had "discussed . . . very thoroughly" the question whether a private plaintiff should have the right to sue for such post hoc structural remedies as dissolution, but that "we decided he should not have it." *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 842 (1914) (Representative Floyd). Congress, moreover, explicitly considered and overwhelmingly rejected an amendment that would have permitted state attorneys general to seek all of the equitable remedies available to the federal government under section 15. Thus, although Congress plainly intended to give private plaintiffs (including state attorneys general) the same ability to seek *prohibitory* injunctions as section 15 gave to the federal government, the legislative history demonstrates beyond doubt that Congress meant what it said: non-federal plaintiffs were not to have *all* of the equitable remedies section 15 affords.

This decision, moreover, was based upon compelling considerations of antitrust enforcement policy. Chief among Congress's reasons for denying mandatory relief to non-federal plaintiffs was its view, articulated by several legislators in 1914, that such a potent weapon was best left in the hands of federal antitrust authorities "who are primarily charged by Congress with the duty of

protecting the public interest." *United States* v. *Borden*, 347 U.S. 514, 518 (1954). No doubt, that was one reason why Congress once again specifically refused to grant state attorneys general authority to bring divestiture suits when it enacted the Hart-Scott-Rodino Act in 1976.

In short, petitioner simply disagrees with the policy choice Congress made in 1914, and again in 1976, to deny plaintiffs other than the federal government the authority to seek the kind of broad equitable relief necessary to "undo" a completed merger. If petitioner believes a private divestiture remedy is truly necessary to "fill the gaps" (Pet. Br. 25) in federal antitrust enforcement, it should address its policy arguments to Congress or to its own state legislature, not to this Court.

ARGUMENT

I. The Language Of The Clayton Act Excludes Post Hoc Structural Relief, Like Divestiture, From The Injunctive Relief Available Under Section 16.

The starting point for interpreting any statutory provision is, of course, the language enacted into law by Congress. *E.g.*, *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986) (interpreting section 16); *Hallstrom* v. *Tillamook County*, 58 U.S.L.W. 4007, 4008 (1989); *United States* v. *Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989); *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). Obviously, the meaning of words can change over time; for that reason, the terms of a statute enacted in an earlier era must be given their commonly-understood meaning as of that time. *E.g.*, *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 610-13 (1987) ("race" in Reconstruction-era statute to be given meaning it had when statute was enacted); *McNally* v. *United States*, 483 U.S. 350, 356-57 (1987) (meaning of "defraud" in mail fraud statute determined as of period when statute enacted). Moreover, if the statute borrows a legal term of art or invokes a well-established, judicially-defined concept, that term or concept should be given the meaning it would have conveyed to a contemporary jurist. *E.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Ignoring (or perhaps avoiding) these fundamental principles, petitioner advances a legal argument that reduces to the following syllogism: First, the relief available to private plaintiffs under section 16 of the Clayton Act is coextensive with the equitable relief available to the federal government under section 15. Pet. Br. 9, 37, 41.[6] Second, this Court has held that divestiture is available to the government under section 15. *E.g.*, *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). Therefore, divestiture also must be available to a private plaintiff under section 16. Pet. Br. 9, 11-13.

The fundamental flaw in this argument is its major premise: Even a superficial analysis of the two relevant statutory provisions shows that their language cannot be squared with petitioner's assertion that the explicitly limited relief available under section 16 is coextensive with that available to the federal government under section 15. Moreover, when the Clayton Act is considered in light of contemporaneous principles of equity jurisprudence (which section 16 expressly invokes), it is apparent that Congress intended to (and did) limit the relief available under section 16 to preventive injunctions directed at threatened antitrust violations. This limitation precludes post hoc structural remedies, like divestiture, that are designed to "undo" already-completed transactions.

A. On Its Face, The Language Of Section 16 Forecloses The Argument That The Equitable Relief Available To Private Plainuffs Is Coextensive With That Available To The Federal Government Under Section 15.

Even without close analysis, the premise of petitioner's entire argument runs headlong into two well-established principles of statutory construction. The first is that

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[6] Petitioner concedes (Pet. Br. 26 n. 5) that it is treated as a private plaintiff for purposes of Section 16. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945).

when Congress uses different language in parallel provisions of the same statute, it intends those provisions to have different meanings. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 108 S.Ct. 626, 630 (1988) (interpretation of statutes is an "holistic endeavor"). Section 15 of the Act authorizes the federal government, without qualification, to commence any "proceedings in equity" to remedy a violation of the antitrust laws. 15 U.S.C. § 25. By contrast, the relief available to any party suing under section 16 (including private parties and states acting as *parens patriae*) is expressly limited to "injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." 15 U.S.C. § 26. The fact that Congress used completely different words in section 16 to describe the relief available to litigants other than the federal government creates a powerful and, in this case, entirely unrebutted presumption that different remedial authority was intended.[7]

Second, petitioner's interpretation of section 16 violates the well-established principle that statutes should be read so as to give effect to every word and phrase. *E.g.*, *Mountain States Tel. & Tel.*, 472 U.S. at 249; *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); C. Sands, *Sutherland Stat. Const.* § 46.06 at 104 (4th ed. 1984).

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[7] Other federal statutes granting authority to seek injunctions—such as Section 13(b) of the Federal Trade Commission Act—contain no such limiting language. See 15 U.S.C. § 45(b) (the Federal Trade "Commission may seek, and after proper proof, the court may issue, a permanent injunction"). Because the language of section 16 explicitly limits the equitable remedies available to non-federal plaintiffs, the general rule requiring broad construction of *unrestricted* grants of equitable jurisdiction does not apply here. Cf. Pet. Br. 10-11, 13 (citing *Brown* v. *Swann*, 35 U.S. 331 (1836); *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946).

Assuming *arguendo* that the phrase "injunctive relief" in section 16 is synonymous with the "equitable relief" provided by section 15—which is by no means clear (see, *e.g.*, *IT&T* v. *GTE*, 518 F.2d 913 (9th Cir. 1975))—petitioner's interpretation renders the qualifying language in section 16 meaningless. Under petitioner's argument, a federal court's authority to issue injunctive relief is limited *only* by the requirement that such relief be issued "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity." Pet. Br. 10. But petitioner's interpretation studiously ignores the phrases "against threatened loss or damage" and "against threatened conduct that will cause loss or damage," both of which modify "injunctive relief" in the statute.[8]

Petitioner makes no attempt to explain how the limitations in section 16 on the injunctive relief available to private plaintiffs can possibly mean the same thing as the simple grant of authority to initiate "proceedings in equity" contained in section 15. Nor does petitioner make any effort to explain the meaning of the limiting phrases "threatened loss or damage" and "threatened conduct that will cause loss or damage." Accordingly, petitioner's assertion that Congress granted the very same remedial authority to private parties that it granted to the federal government must be rejected.

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[8] One of petitioner's *amici*, the Center for Public Interest Law, illustrates the flaw in petitioner's argument with disarming simplicity. In trying to bolster petitioner's claims, this *amicus* quotes "the plain wording of section 16" as follows: "Any person . . . shall be entitled to . . . have injunctive relief . . . under the same conditions and principles as . . . granted by the courts of equity . . . ." (Br. 4). With its almost humorous use of elipses, the *amicus* has successfully created the statute petitioner wishes Congress had enacted in 1914. Unfortunately for petitioner, the "plain language" argument advanced by its *amicus* shows precisely how petitioner's proposed interpretation of section 16 has rendered superfluous the two crucial limiting clauses in that provision and, therefore, why petitioner's interpretation of the statute must be wrong.

B. The Language Used In Section 16 Does Not Permit Private Plaintiffs To Seek Mandatory Injunctions To "Undo" Completed Antitrust Violations.

Petitioner has good reason to avoid any close scrutiny of the statutory language. The meaning of section 16's limiting language becomes crystal clear when it is considered in light of well-established equitable principles which were widely understood in 1914, but have fallen into relative desuetude since the merger of law and equity in most American courts. As this Court held in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 n. 24 (1969), section 16 explicitly invokes those principles by stating that injunctive relief against threatened loss or damage may be granted only "when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity." Analysis of the relevant body of equity jurisprudence plainly reveals that this language limits the relief available under section 16 to "prohibitory" or "preventive" injunctions, thereby excluding "mandatory" or "restorative" equitable relief—the kind of relief necessary to "undo[]" (Pet. Br. 16) a completed transaction.

1. The distinction between prohibitory and mandatory equitable relief dates back to Roman civil law,[9] and was well-established in 1914 when the Clayton Act was passed. A prohibitory injunction (also called a "preventive," "negative," "restrictive" or "ordinary" injunction), was defined in a well-known 1914 law dictionary as an order "enjoining the *performance* of an unlawful act." J. Bouvier, *Law Dictionary and Concise Encyclopedia* 1569 (8th ed. 1914); see also G. Bispham, *The Principles of Equity* 578 (8th ed. 1913) (prohibitory injunction is "one which is granted for the purpose of restraining the defendant from the *continuance or commission of some act* which is injurious to the plaintiff"); J. Pomeroy, *A Treatise on Equity Jurisprudence* 2665 (3d ed. 1905).[10] As these definitions make clear, a prohibitory injunction could be issued only against unlawful acts that were not yet completed. For that reason, it was often said that a preventive or prohibitory injunction could not be issued to undo an already-completed act or to correct or redress past wrongs. *E.g.*, Bouvier at 1577; *Davis* v. *Hartwig*, 195 Mo. 380, 94 S.W. 507 (1906); *Comm'rs of Highways* v. *Deboe*, 43 Ill. App. 25 (1892); *East Saginaw St. Ry. Co.* v. *Wildman*, 25 N.W. 193 (Mich. 1885); J. Story, *Commentaries on Equity Jurisprudence* 182 (1886).

[9] J. Story, *Commentaries on Equity Jurisprudence* 185 (1886) (discussing Roman law distinction between prohibitory and "restitutory" interdicts); see also J. Pomeroy, *A Treatise on Equity Jurisprudence* 2665 n. 1 (3d ed. 1905).

By contrast, a mandatory injunction (also called an "affirmative" or "restorative" injunction) was one that "compels the defendant to *restore things to their former condition*, and virtually directs him to perform an act." Bispham at 574 (emphasis added). Like other kinds of "affirmative" equitable relief, including dissolution,[11] a mandatory injunction was not issued to halt the commission or continuance of an injurious act, but rather to "undo" acts that had already been completed, or to require the fulfillment of neglected duties. *E.g.*, Pomeroy at 2697 (mandatory injunction compels a defendant to "undo" wrongful act); Story, *supra*, at 182 n.(a) (mandatory injunction "employed to undo what has been done"). Because they were so much more intrusive than prohibitory injunctions, and because they were more difficult to enforce, mandatory injunctions were "granted only with great caution" (Bispham at 577) and "resorted to rarely" (Bouvier at 1570). See generally C. Langdell, *A Brief Survey of Equity Jurisdiction* 33-38 (1908).

The distinction between prohibitory and mandatory relief is well illustrated with an example used by several

[10] The term "injunction," standing alone, generally referred to a prohibitory injunction in 1914. *E.g.*, Bouvier, *supra*, at 1569.

[11] *E.g.*, J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1337-1421 (3d ed. 1905); J. Adams, *The Doctrine of Equity* 239-43 (8th ed. 1890) (extended discussion of dissolution).

turn-of-the-century commentators. Assume that a property owner proposed to build a wall located so that it would darken a neighbor's windows, an action that would constitute a nuisance at common law. *E.g.*, Story at 229-30. If the neighbor brought an equitable action before construction began, he could obtain a prohibitory injunction enjoining the building of the wall. Similarly, if the neighbor brought an action during construction, he could obtain a preventive injunction enjoining *further* construction, that is, preventing the continuation of ongoing, illegal conduct. But if the neighbor wanted the wall torn down (whether it was fully or partially completed), he would have to obtain a mandatory injunction requiring the owner of the wall to remove it. *E.g.*, C. Sweet, *A Dictionary of English Law* 432 (1882); H. Black, *A Law Dictionary* 626-27 (2d ed. 1910). Such an injunction might be issued in a negative or prohibitory form, but it was still considered mandatory if it required the defendant to "undo" the prior act of building the wall.[12] Whether an injunction is mandatory or prohibitory, therefore, turns on whether the *act* that is the subject of the order can still be said to be *threatened* or instead has already been completed.[13] It does not turn on the technical form of the order itself.

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[12] The court of equity could issue such an order in any of three forms: (1) it could directly command the defendant to take down the wall; (2) it could prohibit him from refusing to take down the wall; or (3) it could prohibit him from permitting his previous wrongful act (in building the wall) to continue. *E.g.*, Black, *supra*, at 626-27. But, regardless of its form, the order would have been considered a mandatory injunction because its effect was to require the defendant to "undo" the prior unlawful act. *Id.* at 627; Bispham, *supra*, at 574 (under old practice, form of mandatory injunction was not "direct in its terms; but the end was reached by a writ apparently prohibitory"); Pomeroy at 2665 ("mandatory injunction . . . always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation").

[13] In describing the kinds of wrongs that could be remedied through injunction, equity treatises frequently distinguished between "actual" or "existing" wrongs and "threatened" wrongs. *E.g.*, Pomeroy at 2681-82 (distinguishing between threatened and actual waste, and between threatened and existing nuisance); *id.* at 2685 ("actual" versus "threatened" interference with easements and equitable servitudes).

For purposes of the distinction between prohibitory and mandatory equitable relief, moreover, it is irrelevant that a completed illegal act—a fully constructed wall, for example—might continue to produce injury after its completion. Indeed *no* equitable relief could be issued against a completed act unless that act continued to cause some injury; otherwise legal remedies (*i.e.*, damages) would be adequate, and equitable relief would therefore be unavailable. *E.g.*, Bouvier at 1572; Bispham at 579; Story at 230; Pomeroy at 2667. Thus, even if completed actions produce continuing injury, they can be "undone," if at all, only through mandatory relief.

2. The distinction between prohibitory and mandatory or "affirmative" relief is also well illustrated by the various kinds of equitable relief issued against antitrust violations. For example, an order prohibiting an alleged monopolist from charging predatory prices or otherwise exercising monopoly power is a form of prohibitory relief. But an order "breaking up" or "dissolving" an alleged monopoly is archetypical affirmative or mandatory relief, as that phrase was understood in 1914 and for centuries before, because it seeks to "undo" what has already been done. See *infra* 19-21; see also *United States* v. *American Tel. & Tel.*, 552 F. Supp. 131, 166 (1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 184-188 (1911); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77-82 (1911). A divestiture order, which (to borrow petitioner's own description) is "an injunction mandating divestiture of assets acquired in violation of section 7" (Pet. Br. 10), likewise is mandatory relief. Indeed, divestiture of assets is simply one means by which an alleged monopoly may be dissolved (*e.g.*, 221 U.S. at 186), and the term "disolution," as used in 1914, therefore in-

cluded divestiture (*id.* at 187; see *infra* at 25, n. 18). Both remedies, moreover, can be characterized as post hoc structural relief, *i.e.*, "relief addressing the structural nature" of an already-completed transaction (Pet. Br. 21). See also L. Sullivan, *Handbook of the Law of Antitrust* 142-47 (1977) (discussing distinction between remedies aimed at conduct and those aimed at structure).

3. Viewed in this context, the equitable relief Congress made available to private plaintiffs when it enacted section 16 did not and does not include mandatory injunctive relief. First, the injunctive relief available under that provision can be issued only "against threatened loss or damage by a violation of the antitrust laws"—that is, the relief must be designed to prevent threatened injury arising from an antitrust violation, not to redress loss or damage arising from a completed violation of the antitrust laws.[14] Second, the injunctive relief provided by section 16 can be issued only against "threatened conduct," *i.e.*, conduct that has either not yet begun at all or that has already begun yet "threatens" to continue. Mandatory relief, by contrast, *requires* that certain conduct be taken to redress or "undo" prior completed acts (*supra* at 14-15). It therefore cannot accurately be said to be granted against "threatened conduct," *i.e.*, conduct that has either not yet begun at all or that has already begun and "threatens" to continue.

This limitation on the kinds of equitable or injunctive relief that may be issued in a section 16 suit necessarily

[14] The "threatened loss or damage" language cannot be explained as merely limiting the issuance of an injunction to cases in which some harm will occur absent the injunction. Pet. Br. 8, 10. Other language in section 16 expressly states that injunctions granted under that section are to be governed by standard equitable principles, and one of those principles is that an injunction can issue only if there is no adequate legal remedy for the alleged wrong. *E.g.*, J. Bouvier, *Law Dictionary and Concise Encyclopedia* 1572 (8th ed. 1914); *supra* at 9. If legal remedies are inadequate, by definition, some harm to the plaintiff will occur unless an injunction is issued.

means that private plaintiffs may not seek post hoc, structural remedies such as divestiture. See *infra* at 19-22 (discussing cases). As previously noted (*supra* at 17) a divestiture order does not merely prohibit threatened conduct. Rather, it "mandates" (Pet. Br. 10) an affirmative alteration of the status quo, namely, the "undoing" (Pet. Br. 16) of an already-completed merger or acquisition.

II. Contemporaneous Judicial Interpretations Confirm That The Relief Available Under Section 16 Is Limited To Preventive Injunctive Relief Against Threatened Violations, And Therefore Does Not Include Post Hoc Structural Remedies Such As Divestiture.

This conclusion is further confirmed by court decisions interpreting section 16 shortly after it was enacted. Such contemporaneous court interpretations are an "invaluable aid" in determining meaning of a statute. C. Sands, *Sutherland Stat. Const.* § 49.03 at 353 (4th ed. 1984). The early decisions uniformly held that section 16 authorizes only preventive injunctive relief, and therefore does not permit plaintiffs, other than the federal government, to seek post hoc structural relief.

1. The earliest decision of this Court interpreting section 16 was *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27 (1916), decided two years after passage of the Clayton Act. There, a shareholder of a particular corporation had instituted a suit *in equity* for treble damages against third parties under section 7 of the Sherman Act because the corporation itself, which alone could institute a treble damage action at law, declined to do so. After concluding that the shareholder's equitable suit had been properly dismissed under the Sherman Act, the Court also held that such a suit (which would have been considered a suit for restitution, a form of mandatory equitable relief) would not lie under section 16 of the Clayton Act because the relief it sought was not preventive in nature: section 16, according to the Court, "does not go farther in terms than to give an injunction to private persons against threatened loss." *Id.* at 29.

The next decision of the Court interpreting section 16 was *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which also involved a suit for an injunction (this time against a secondary boycott) filed prior to the passage of the Clayton Act. The Court concluded that section 16 could properly be applied to previously pending suits, in part because the equitable relief available under the statute applied only to prevent future acts. Referring to section 16's provision for injunctive relief "against threatened loss or damage," the Court stated, "[o]bviously, this form of relief operates only *in futuro*." *Id.* at 464. See also *General Investment Co.* v. *Lake Shore & Mi. S. R. Co.*, 260 U.S. 261, 287 (1922) (section 16 enables plaintiffs threatened with loss or damage to maintain suits to "enjoin" (*i.e.*, prevent) threatened violations).[15]

2. Shortly after passage of the Clayton Act, several lower courts addressed the precise question in this case, *viz.*, whether section 16 permits a suit for divestiture. The first such decision was *Venner* v. *Pennsylvania Steel Co.*, 250 F. 292 (D.N.J. 1918), which involved the acquisition of the Pennsylvania Steel Company of New Jersey by Bethlehem Steel. A shareholder of Pennsylvania Steel sued under section 16 to "set aside" the acquisition. Citing this Court's decision in *Fleitmann* v. *Welsbach*, *supra*, the district court dismissed, holding that "[t]he suits covered by [section 16] are limited to those seeking preventive relief; *i.e.*, injunction 'against threatened loss or damage.'" *Id.* at 296. The court continued:

[15] This Court has continued to recognize this limitation on the equitable relief available under section 16. Most recently, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the Court stated that injunctive relief may be granted under section 16 as long as the plaintiff "demonstrate[s] a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.* at 130. This description of the relief available under section 16 is virtually identical to Bispham's definition of a prohibitory injunction. See *supra* at 14.

> No other equitable suits, at the instance of private parties are expressly authorized by the Clayton Act; and, as the relief sought in the present supplemental bill is not of a preventive character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available to [the plaintiff] under that bill.

Id.

Six years later, Judge Learned Hand reached the same conclusion in a virtually identical case involving another acquisition by Bethlehem Steel. *Graves* v. *Cambria Steel Co.*, 298 F. 761 (D.N.Y. 1924). Judge Hand began by noting that section 16 had been enacted "to fill a hiatus left in the Sherman Act, under which the courts had held that private suits [in equity], as distinct from private actions [*i.e.*, actions at law], did not lie." *Id.* at 762. Hand continued:

> When Congress came to amend that situation, they expressly limited the equitable relief to injunctions for threatened loss or damage. That was language apt, and apt only, to answer the case of a *threatened* multiplicity of torts at law. With the knowledge before it of the prior attitude of the courts toward the [Sherman] statute, there can be no question that the words were used in the conventional sense which tradition would impute to them.

Id. (emphasis added).[16] On that basis, Judge Hand concluded as follows:

> The suit at bar, whatever else it is, is not a suit for an injunction [within the meaning of section 16]; indeed, it is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act.

[16] Judge Hand's reference to a "threatened multiplicity of torts at law" was an allusion to the most common situation calling for an injunction, namely, a common-law nuisance which, once begun, would create ongoing, cumulative claims for damages. See Langdell, *supra*, at 21, 34-35; Story, *supra*, at 229-30.

Id. Thus, Judge Hand, like the court in *Venner*, held that divestiture was not available because "the words" of section 16, "used in the conventional sense which tradition would impute to them," authorized only preventive injunctive relief.

The Sixth Circuit reached the same conclusion two years later in *Continental Securities Co.* v. *Michigan Cent. R.R. Co.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927). Relying on section 16's limiting language, that court rejected a divestiture suit by a disgruntled shareholder because the plaintiff was alleging a violation "which took permanent shape as a completed act some time before the bill was filed." *Id.* at 379. The court stated:

> The main remedy sought is dissolution of the combination. Section 16 never has been held to reach such a case. The result sought is practically the same as would be asked for in a suit by the Attorney General [under section 15].

Id.

In short, *all* of the early lower court decisions addressing the question squarely held that section 16 does not authorize a private plaintiff to seek post hoc structural relief, and did so on the ground that section 16 (as the Supreme Court had held in *Fleitmann* and *Deering*) by its plain language does not provide for mandatory relief. This unanimity among contemporaneous interpretations is compelling evidence of Congress' meaning and intent in choosing the limiting language in section 16.

III. The Legislative History Of The Clayton Act Establishes That Congress Both Understood And Intended The Language Of Section 16 To Exclude Post Hoc Structural Relief.

This Court has previously relied upon the legislative history of the Clayton Act in determining the meaning of section 16. See *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986). That history confirms that Congress clearly understood and intended section 16

to include only preventive relief, thereby excluding divestiture and other post hoc structural remedies. Indeed, the legislative history demonstrates that the draftsmen and sponsors of the Clayton Act considered whether plaintiffs other than the federal government—including, in particular, the states—should be permitted to seek divestiture or dissolution, and expressly concluded that they should not. On the other hand, none of the snippets of legislative history relied upon by petitioner remotely supports a contrary conclusion. Petitioner's arguments, moreover, are directly undermined by Congress's refusal in the Hart-Scott-Rodino Act to permit states to seek divestiture.

A. There Is Overwhelming Evidence That Congress Intended To Deny Non-Federal Plaintiffs The Right To Obtain Post Hoc Structural Relief, And That It Implemented That Intent In The Language Of Section 16.

To appreciate the clarity of Congress's decision to limit section 16, it is helpful to review the legislative history in chronological order. Accordingly, we first discuss the hearings held on Congressman Clayton's proposed bill by the House Judiciary Committee in early 1914.[17] We then analyze the committee reports issued by both the House and Senate committees, as well as associated floor debates. Finally, we discuss the floor debates on the conference committee bill. What is striking about this history—and dispositive for this case—is that at each stage, Congress made clear its intent to deny to private plaintiffs the authority to seek mandatory injunctive relief, including divestiture.

1. Representative Clayton, Chairman of the House Judiciary Committee, commenced hearings on trust legislation on December 9, 1913. *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d

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[17] The Senate held no hearings on the proposed legislation. See E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 1010 (1978).

Cong., 2d Sess. 53 (1914) ("*House Hearings*"). In January, committee prints of four tentative bills were prepared for consideration by the Committee. Those bills had been prepared by a subcommittee of the Judiciary Committee consisting of Representatives Floyd and Carlin along with Chairman Clayton. 51 Cong. Rec. H9156 (daily ed. May 23, 1914). The first of those bills proposed to add to the eight sections of the existing Sherman Act a new section 13 which, with minor irrelevant modifications, was ultimately enacted as section 16 of the Clayton Act. *House Hearings* at 1567-83.

The House hearings are unusually significant for two reasons. First, inasmuch as those hearings were held to consider a fully drafted bill which contained the very language at issue here, the discussion of that section of the proposed bill at the hearings indicates how the language of that provision was understood by competent lawyers at the time. Those lawyers included the well-known antitrust lawyer and later Associate Justice of this Court, Louis Brandeis, who testified as the spokesman for the Wilson administration.[18] Second, Representatives Clayton, Floyd, and Carlin—the draftsmen and sponsors of the proposed bill—were also the principal questioners at the hearings; their statements and questions, therefore, provide substantial insight into their intent, and by extension the intent of Congress, in enacting section 16. *E.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1402 (1988) ("It is the sponsors that we look to" when interpreting statutory language); (quoting *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964); *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (views

[18] Brandeis had been a leading force in the movement to amend the Sherman Act in the wake of the Supreme Court's *Standard Oil* decision. He had also participated in the drafting of earlier proposals to amend the Sherman Act, specifically the so-called La-follette-Lenroot bills. See Kintner at 994, 997-1002.

of draftsmen entitled to considerable weight in determining intent of statute).

One of the first witnesses to testify about the proposed private-injunction provision was Felix H. Levy, a New York antitrust lawyer, who testified before the Committee on February 3, 1914. Levy thought that even in its limited form, section 16 "is rather dangerous, as giving power to individuals which could be readily misused." *House Hearings* at 260. Representative Carlin responded as follows:

> Mr. CARLIN. The criticism we have had with reference to that section is that it does not go far enough.
>
> Mr. LEVY. Not giving the individual sufficient rights?
>
> Mr. CARLIN. That is to say, it has been contended by some that we ought to give the individual the *same* right to sue for an injunction that the Government enjoys.

Id. (emphasis added). Carlin then referred to proposals—never enacted—that would specifically have permitted individuals to sue for "dissolution," as well as a proposal that also would have given the individual the right to implead the government in such a suit. *Id.* at 261; see also *id.* at 650 (discussing proposals). Levy replied that such proposals were "entirely unnecessary" in light of the government's own power to bring equitable actions and its willingness "to put at the service of individuals the machinery of the Department of Justice under the Sherman law." *Id.* at 261; see also *id.* at 263 (statement by Representative Floyd that section 16 would not permit dissolution suits, *e.g.*, suits "involving the whole power of the Standard Oil Co.")

The next witness to address the proposed private-injunction provision was another New York antitrust lawyer, Samuel Untermeyer, who testified on February 6, 1914. Untermeyer had suggested that a private person should be given the right to seek dissolution, subject to the federal government's having an option to take con-

trol of the litigation.[19] Representative Floyd's response to this proposal reflects Congress' intent to deny private plaintiffs the authority to seek post hoc structural remedies:

> Mr. FLOYD: We did not intend by [section 16 of the Clayton Act] to give the individual the same power to bring a suit to dissolve the corporation that the Government has.
>
> Mr. UNTERMYER: He ought to have it.
>
> Mr. FLOYD: We discussed that very thoroughly among ourselves, and *we decided he should not have.*

Id. at 842 (emphasis added). In response, Untermyer argued that what individual plaintiffs really needed was a remedy *not* against threatened *conduct*, but against the "very existence" of a corporation or combination that causes injury:

> Mr. FLOYD: This provision [section 16] was intended to give an individual that was being injured by one of these unlawful combinations or corporations, who had a right under section 7 of the act to recover threefold damages in case he was injured—
>
> Mr. UNTERMYER: I understand.
>
> Mr. FLOYD (continuing): The right to enjoin them from doing these things to his business, and, in their general operation, to enjoin them under section [16] of this act, in so far as their unlawful *operations* affected him individually.
>
> Mr. UNTERMYER: But the very existence of the combination may be the only and vital thing that affects them. That is, the fact that unlawful combination is doing business . . . . *It may not do any overt act at all*, and generally does not, but it is the fact that it exists in violation of law that injures

[19] The remedy of dissolution or the "breaking up" of a monopoly —includes what we call divestiture. See *supra* 17-18; see also *House Hearings* at 689 (Brandeis' discussion of the Union Pacific Case); 51 Cong. Rec. S14520-21 (daily ed. Sept. 1, 1914) (Letter from Attorney General's office explaining recent antitrust cases and consent decrees).

> him. In nearly all the private suits for damages that have been brought that has been the gravamen of the claim. . . . There is no reason why a private individual should not be able to stop that sort of a violation . . .
>
> • • • •
>
> The point is here, that *the very relief that the man needs nine times out of ten is the dissolution of the corporation, because, as I say, it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him*; and therefore he ought to have the right to begin the suit.
>
> Mr. CARLIN: You approve of this section as far as we have gone, but think it ought to have gone further?
>
> Mr. UNTERMYER: Yes.

House Hearings at 842-46 (emphasis added); see also *id.* at 963 (statement by another witness that section 16, as drafted, permitted an order only to "enjoin the doing of a particular act," and did not extend to dissolution). Despite Mr. Untermyer's urging, the section never was amended to "go further" than prohibitory injunctions against specific, illegal "overt acts."[20]

[20] In *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), the First Circuit makes two unsuccessful attempts to minimize the importance of this exchange: *First*, the court relies upon the fact that committee hearings had "been in session barely one week," and on that basis asserts that "[i]t is difficult to believe that a commitee intention had been formed at this early stage." 754 F.2d at 426. But the critical point of the Carlin-Untermyer exchange is that the *language* used in the Committee's draft of section 16—the same language Congress ultimately enacted —was understood clearly as not permitting an individual to sue for dissolution. In any event, the Committee had had ample time to form an intent on the issue inasmuch as the Committee (or at least a subset of the Committee, see 51 Cong. Rec. H9156) had already drafted proposed legislation before the hearings began, and, indeed, had been considering similar legislation for some time prior to 1914. *Second*, the First Circuit maintains that, "regardless what weight is accorded these remarks," Representative Floyd's statement is not dispositive on the availability of divestiture because divesti-

On February 12, 1914, the Committee heard testimony from Gustavus A. Rogers, another New York attorney. Rogers told the story of a monopoly in the film industry that had driven competitors out of business by invoking certain termination clauses in film licensing agreements. *House Hearings* at 471-84. When Rogers mentioned that some of the competitors had attempted to get an injunction compelling the monopoly to deal with them again, Representative Carlin asked him what he thought of the private-injunction provision in the proposed bill:

> Mr. CARLIN. You approve that provision in the bill?
>
> Mr. ROGERS. The provision that an individual may have equitable relief?
>
> Mr. CARLIN. Yes.
>
> Mr. ROGERS. *I go a step further.* In order to clarify the situation *I would have that language read that the courts are empowered to issue mandatory injunctions* compelling persons complained of to maintain trade relations with others, where the charge is made that the purpose of the refusal to maintain those trade relations is to get rid of a competitor and to further a monopoly.

House Hearings at 484 (emphasis added). Representative Carlin, however, attempted to persuade Rogers that the purely *preventive* relief provided by the proposed section 16 was sufficient to meet the evil he had described:

> Mr. CARLIN. The real trouble with your business was in the combination and formation of the [monopolist's] rental company . . . . If that company could have been *prevented* you would have had the right

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ture (for reasons not explained by the First Circuit) is substantially different from dissolution. But it is apparent from several portions of the legislative history that "dissolution" was a generic term that includes what we now call divestiture. See *supra* n. 18. Moreover, the fact that an injunction was used as a means to implement dissolution in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185-86 (1911) (see 745 F.2d at 428) is irrelevant because that injunction was, in substance, mandatory rather than prohibitory.

> to an equitable injunction [under the proposed bill]. When that was done you would not have had any trouble at all.
>
> Mr. ROGERS. There would have been some trouble, but the combination would not have put the hundred and odd companies out of business.

Id. (emphasis added). Later, Representatives Nelson (another member of the Judiciary Committee) and Carlin had the following exchange with Mr. Rogers:

> Mr. NELSON. You have had a great deal of experience with a trust. *This tentative bill No. 1, in section [16], would have given you, had it been in force, injunctive relief only. Would it not have helped you if you could have brought suit for the dissolution of that trust? This section only gives you injunctive relief.*
>
> Mr. ROGERS. Well, I think I could answer that by saying that I think at common law we would have a right that would be analogous to the institution of a suit for dissolution. At common law you can restrain a conspiracy as such . . . . *But even if we could restrain them from carrying out this conspiracy, that is where we would have to stop. That would be negative relief. We could not get affirmative relief. . . .*
>
> Mr. CARLIN. Mr. Untermeyer suggested to this committee that we ought to give the individual the right to sue for dissolution and to interplead the Government in that suit. *The committee had not thought to up to this time. This [proposed bill] does not give the individual the right to sue for dissolution.*
>
> Mr. ROGERS. *Naturally, no.*

Id. at 491-92 (emphasis added). This exchange again makes clear that section 16 was understood as limited by its terms to negative relief"—*i.e.*, preventive relief—and as not extending to "affirmative relief" such as dissolution.

Louis Brandeis testified on February 16, 1914. Brandeis was asked by Representative Carlin to comment on a proposal to create a private right to sue for dissolution.

Carlin phrased the question in a way that makes absolutely clear the understanding that section 16, as drafted, would not permit a plaintiff other than the federal government to sue for such post hoc structural relief:

> A great many suggestions have been made to us with reference to these two sections, [sections 15 and 16]. Now, section [16] is one which gives the individual the right to injunctive relief. It has been suggested to us that we ought to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform. What do you think of that suggestion?

House Hearings at 649. Brandeis stated that the proposal referred to by Carlin was "not a sound one." He continued:

> It seems to me that the *right to change the status*, [of the combination] which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances *and protection against future wrongs* is a right which every individual ought to enjoy.
>
> Now, all of this procedure ought to be made so as to facilitate, so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that *the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust.*
>
> • • •
>
> It seems to me that if those suggestions were adopted that any citizen, instead of the Department of Justice, would be charged with the administration of the law.

Id. at 649-50 (emphasis added). In addition to indicating Brandeis' understanding that the statute as proposed (and ultimately enacted) did not permit private plaintiffs to seek dissolution, Brandeis' statement clearly illustrates the well-established distinction between post hoc

structural remedies (*i.e.*, those affecting the "status" of a defendant) and remedies enjoining threatened conduct (*i.e.*, those protecting against "future wrongs").

2. On May 6, 1914, the Clayton Act was favorably reported (with certain amendments not relevant here) to the floor of the House. The Committee report fully supports the conclusion that the private-injunction provision was limited to prohibitory relief. That report described the purpose of that provision as follows:

> Under section 7 of the [Sherman] act, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation or association to enjoin *threatened loss or damage* to his business or property *by the commission of such unlawful acts*, and the purpose of this section is to remedy such defect in the law.

H.R. Rep. No. 627, Pt. 1, 63 Cong., 2d Sess. 21 (May 6, 1914) (emphasis added). The report thus makes clear what is clear from the language of section 16 itself: that the private injunction remedy reaches only *threatened* loss or damage by the commission of unlawful acts.

The reading of the committee report was followed by a floor statement by Representative McGillicuddy, a member of the House Judiciary Committee, on May 26, 1914. After observing that the existing Sherman Act provided no mechanism by which a business threatened by a monopoly could prevent "threatened loss or damage," Representative McGillicuddy stated:

> The proposed bill [section 16] solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing injunctive relief against the *threatened act that will cause such loss or damage*. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy.

51 Cong. Rec. H9261 (daily ed. May 26, 1914) (emphasis added). See also *Cargill*, *supra*, 479 U.S. at 112 (quoting same passage). Like the Report itself, McGillicuddy's statement describes section 16 as explicitly limited to "injunctive relief against the *threatened act* that *will cause* such loss or damage," that is, to prohibitory rather than mandatory relief.

3. The Senate Judiciary Committee held no hearings on the proposed legislation, and the Senate Report contains nothing of relevance here. See S. Rep. No. 698, 63d Cong., 2d Sess. (July 22, 1914). The full Senate, however, debated the proposed legislation at length. The most significant feature of that debate for purposes of this case was the resounding *defeat* of a proposed amendment that would have explicitly granted to state attorneys general the authority to seek post hoc structural remedies.

On August 31, 1914, Senator Reed of Missouri proposed an amendment to the Clayton bill providing that "the attorney general of any State may . . . bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong., Rec. S14476 (daily ed. Aug. 31, 1914). Such a provision would have permitted a state attorney general, like the federal government, to sue for any kind of equitable relief under section 15 of the Act and, in particular, for dissolution.[21] This pro-

[21] According to Senator Reed, the primary purpose of this proposal was to remedy what some Senators viewed as unduly cautious enforcement of the Sherman Act by the Department of Justice. 51 Cong. S14519 (daily ed. Sept. 1, 1914) (Senator Reed) ("the enforcement of the Sherman Antitrust Act has been a farce, a sham, and a disgrace to our jurisprudence"). And the principal complaint against the Justice Department articulated during those debates was its alleged failure to pursue structural remedies with sufficient vigor. Senator Nelson of Minnesota, for example, pointed to *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904), as an example of a dissolution case that had been brought only reluctantly by the Department of Justice, and which could have been brought by the attorney general of Minnesota if Senator Reed's proposed amendment had been in effect at that time. 51 Cong. Rec. S14476, 14478 (daily ed. Aug. 31, 1914). And Senator Reed, quoting the private secretary to former Attorney General McReynolds, decried the Justice Department's "'failure to insist upon a real dissolution of monopolies and combinations which the courts had adjudged unlawful.'" 51 Cong. Rec. S14520 (daily ed. Sept. 1, 1914) (Sen. Reed). Thus, one of Senator Reed's motives in proposing the amendment was to permit state attorneys general to sue for dissolution.

posal, however, was roundly criticized by a number of Senators who echoed Brandeis' view that the "administration" of the antitrust laws primarily resides with the Department of Justice. See *supra* at 30; 51 Cong. Rec. S14477 (daily ed. Aug. 31, 1914) (Senator White). Senator Lewis argued that partisan politics could well lead to enforcement chaos under Senator Reed's proposal:

> You will have a Republican Attorney General instituting litigation not in harmony with the Democratic State attorneys general . . . and perhaps founded on political considerations. You will have a conflict ceaselessly going on, with the public being ground between the upper and the nether millstones.

51 Cong. Rec. S14476 (daily ed. Aug. 31, 1914) (Senator Lewis). Other Senators noted the possibility that providing such authority to state attorneys general might produce inconsistent court orders (*id.* at S14477 (Senator Gallinger)), might create barriers to effective prosecution by the federal government (*id.* (Senator White); *id* at S14514 (Senator Chilton)), and would amount to a "confession of our inability through the Department of Justice to prosecute the suits that belong to that department" (*id.* at S14516 (Senator Gallinger)).[22] Another Senator noted that because it would cede primary responsibility for enforcement of a federal statute to the states, the proposed amendment was "an innovation unheard of and

[22] Senator White also asked the following rhetorical question: "If this amendment is correct in principle, should we not also enact a law saying that whenever the governor of any State differs with the President of the United States about the enforcement of Federal laws or handling Federal questions, the matter should be left to the governor of the State?" 51 Cong. Rec. S14516 (daily ed. Sept. 1, 1914).

unparalled in the history of congressional legislation." *Id.* at S14518 (Senator Colt). Senator Reed's proposal was subsequently modified to give the Attorney General of the United States the power to control and even terminate the state-initiated litigation, but even in its weakest form the amendment was rejected. 51 Cong. Rec. S14527 (daily ed. Sept. 1, 1914).

The history of Senator Reed's proposal is significant for three reasons. *First*, it demonstrates the Senate's understanding that section 16, as drafted, did not permit state attorneys general to sue for the *same* relief available to the federal government—including post hoc structural relief. *Second*, the defeat of Senator Reed's proposal demonstrates a congressional intent to deny that power to state attorneys general. See *e.g.*, *Philbrook* v. *Glodgett*, 421 U.S. 707, 718-19 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 732-33 (1975). *Third*, the floor debates over the proposal indicate that the Senate's decision to reject Senator Reed's amendment was based upon compelling policy concerns, which would be contravened by the interpretation of section 16 advanced by petitioner.

4. The Clayton Act was reported out of the conference committee on September 25, 1914, without any modification of section 16. H.R. Rep. No. 1168, 63d Cong., 2d Sess. (Sept. 25, 1914) (conference report).

During the House debates on the conference report, Representative Floyd, defended the proposed Act against charges that it did not go far enough. He gave the following explanation of section 16:

> Heretofore there has been only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States . . .
>
> This provision in section 16 gives any individual, company, or corporation, damaged in its property or business by the unlawful operation or actions of any corporation or combination the right to go into court *and enjoin the doing of these unlawful acts*, instead of having to wait until the act is done and the business destroyed *and then sue for damages*. That clause in the provision of this bill makes it specifically applicable to section 2, 3, 4, 7, and 8 of the bill; so that if a man is injured by a discriminatory contract [section 2], by a tying contract [section 3], by the unlawful acquisition of stock of competing corporations [section 7], or by reason of some one acting unlawfully as a director in two banks or other corporations [section 8], he can do into any court and enjoin and restrain the party from *committing such unlawful acts* or sue for his damages, without regard to the amount in controversy, and recover threefold damages.

51 Cong. Rec. at H16319 (daily ed. Oct. 8, 1914) (emphasis added). By indicating that section 16 permits only injunctions against the "doing" or "committing" of unlawful acts, such as the acquisition of a competitor's stock, Floyd's description excludes the possibility of post hoc, mandatory structural relief, including divestiture. Nowhere did he mention the "undoing" of *past* illegal acts, even though he specifically mentioned the anti-merger provisions of section 7.[23]

B. Nothing In The Snippets Of Legislative History Relied Upon By Petitioner Supports The Availability Of Post Hoc Structural Remedies Under Section 16.

1. Petitioner cites only one passage from the voluminous legislative history of the Clayton Act, a colloquy between Senators Nelson and Shields. According to petitioner, that colloquy indicates that Congress intended to give private litigants *all* of the remedial authority granted to the federal government in section 4 of the Sherman Act. Pet. Br. 39. But petitioner's interpretation of Senator Nelson's statement is directly contradicted by one of Senator Nelson's later statements, not cited by petitioner,

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[23] Representative Webb also stated during the conference report debates that "anybody who is threatened by any loss or damage by reason of any *act* denounced in this bill or in the Sherman anti-trust law . . . can go into courts of equity and *restrain those acts* which seem imminent in threatening him with loss or damage. . . ." 51 Cong. Rec. at H16275 (daily ed. Oct. 7, 1914) (emphasis added).

during the floor debates on the conference committee bill. Alluding to the dissolution remedy that had been discussed at length in the House, Senator Nelson stated:

> Does it not strike you, Senators, as a little unfair that by section 16 of this bill you have for the first time given private individuals the right to go into court and get injunctive relief as the Federal Government can get it, and then, after having given private individuals this remedy by injunction, *you deprive them of part of the remedies that the Federal Government has in a suit instituted by it.* . . . [T]hat is a grave discrimination between the Government and the private litigant.

51 Cong. Rec. at S15946 (daily ed. Sept. 30, 1914) (emphasis added). Though he would have liked the result proposed by petitioner, Senator Nelson clearly did *not* believe (contrary to petitioner's assertions, Pet. Br. 38-40) that section 16 would provide private litigants with the same authority to seek *any kind* of equitable relief that the Government enjoys under section 15 of the Act. This statement is the complete answer to the only piece of legislative history petitioner cites in suppport of its interpretation of section 16.[24]

2. The First Circuit in *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985) (whose analysis petitioner appears to adopt by reference, Pet. Br. 37) relies principally upon three pieces of legislative history. The first is a *minority* report on the proposed Clayton Act by Representative Graham of Pennsylvania. Graham believed that "business should have a rest from further legislation and be given an opportunity to adjust itself to the environment created by the existing

[24] Moreover, Senator Nelson's statement (in the passage quoted by petitioner) that section 16 gives "the same remedy . . . to private parties as was given to the Government" (Pet. Br. 38) is explicitly limited to "injunctive relief" and "injunctive process," as is the statement by Senator Nelson quoted above. And the statement by Senator Shields merely states that section 16 permits private parties, like the federal government, to "bring suits in equity" against antitrust violators, without discussing the *remedies* available to the two classes of plaintiffs. Pet. Br. 39.

antitrust laws," and, accordingly, that section 16 went too far:

> The provision giving to any individual the right to enjoin any threatened loss or damage by reason of any violation of the antitrust laws is a very serious one. . . . The beginning of an investigation by the government on any complaint that a concern has violated the antitrust law, almost immediately to some extent affects his credit but not so seriously as an application for an *injunction, and perhaps a receivership, which might be brought by an individual.*

H. Rep. No. 627, Pt. 2, 63d Cong. 2d Sess. 10 (May 12, 1914) (emphasis added). The First Circuit relies upon the final passage for the proposition that "some committee members believed dissolution and corporate reorganization would fall within the scope of § 16 'injunctive relief.'" 754 F.2d at 422. No such inference is warranted. The passage is not, as the court suggests, a "specific explanation of the meaning of the private injunction provision." *Id.* at 422 n. 21. Nor does it even state that section 16 should "perhaps" permit a private plaintiff to sue for "receivership"; it merely states that private suits for injunction or for receivership are recognized to have a more serious effect on a business's credit than a federal antitrust investigation.

And even if this minority report could be reasonably interpreted as indicating a belief that section 16 *might* permit an individual to bring a suit for dissolution, that belief, coming as it did from an opponent of the legislation, is entitled to no weight. *E.g.*, *Shell Oil Co.* v. *Iowa Dept. of Revenue*, 109 S.Ct. 278, 284 (1988); *Edward J. DeBartolo* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1402 (1988); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). As this Court has noted in an analogous context, opponents of legislation may, "[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach." *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964).

3. The next statement relied upon by the First Circuit is an explanation by Representative Carlin of section 16's purpose:

> [W]e have started with the individual, by giving him rights that he has never possessed under the law—not for the injury of another, but for the protection of himself.
>
> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individal was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So . . . the committee, propose to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. H9270 (daily ed. May 26, 1914) (emphasis added). Despite the First Circuit's suggestion that this statement draws a "parallel between the government's and the individual's right to enjoin antitrust violations" (754 F.2d at 424), the statement nowhere states or implies that private plaintiffs are to be given *all* of the equitable relief available to the federal government; it mentions only the power to "enjoin monopoly." Indeed, the first sentence of this passage indicates Representative Carlin's understanding that the remedies available under the private-injunction provision did not include the right to sue for broad post hoc structural remedies, which would necessarily go beyond a plaintiff's merely "protect[ing] himself." Moreover, it is clear from Representative Carlin's exchanges on the subject of dissolution with Messrs. Untermyer, Levy, Rogers and Brandeis during the hearings that Carlin did not believe section 16, as drafted, would extend to post hoc structural relief. See *supra* at 25-30.

4. The First Circuit also relies upon a Senate amendment (proposed section 25) that would have *required* a district court to dissolve any defendant found guilty of monopolization, through the appointment of a receiver and the winding up of the defendant's affairs.[25] When it became clear that this amendment would be defeated, a substitute was proposed making receivership optional. Although the First Circuit interprets the defeat of this modified amendment—which, unlike the original, was explicitly limited to "suits brought by the United States"—as an indication that Congress did not intend to limit the dissolution remedy to the federal government, no such inference is warranted, for two reasons:

First, this modified version of section 25 was rejected not because it was limited to the federal government, but because it was an unnecessary statement of existing law. Although there had originally been some question whether a court had the authority to dissolve a combination found to be in violation of the Sherman Act, the *American Tobacco* decision clearly had indicated that the courts have that authority. *United States* v. *American Tobacco Co.*,

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[25] The proposed amendment provided that "whenever a corporation shall . . . be adjudged to be a monopoly or combination in restraint of trade," the court rendering the judgment must "decree its dissolution," "appoint receivers to wind up its affairs and . . . cause all of its assets to be sold." 51 Cong. Rec. S15863 (daily ed. Sept. 28, 1914). The First Circuit cites this proposal as indicating "greater conflict over the meaning of 'dissolution' than the Ninth Circuit acknowledges" 754 F.2d at 424, with some legislators apparently believing that "dissolution" could be accomplished through an order requiring a monopolist to divest itself of sufficient assets to deprive it of its monopoly status, and other legislators believing that "dissolution" necessarily included "the winding up of a corporation, or its general termination." *Id.* This provision, however, merely indicates disagreement as to the appropriate *method* for dissolving an illegal trust, not disagreement as to the meaning of the term "dissolution" in the equity jurisprudence of the day. Many legislators were unhappy with the remedies ultimately ordered in the *Standard Oil* and *American Tobacco* cases—both of which were described by the Court as "dissolutions"—and therefore attempted to make mandatory what they sometimes referred to as a "real" dissolution. Indeed, section 25 was itself entitled a "bill to provide for the *real* dissolution of trusts." 51 Cong. Rec. S15863 (daily ed. Sept. 28, 1914).

221 U.S. 106, 185-186 (1911). Thus, the apparent sponsor of the modified version of section 25, Senator Nelson, stated that the purpose of that provision was "to settle the *mooted question* of the equity power of the court to partition and sell the assets of an adjudged monopoly." 51 Cong. Rec. H16326 (daily ed. Oct. 8, 1914) (emphasis added); see also 51 Cong. Rec. at S16052-53 (daily ed. Oct. 1, 1914) (Senators Culberson and Norris).[26]

Second, it is far from clear that the addition of the reference to "suits brought by the United States" was intended as a substantive change. In proposing the original version of section 25, Senator Reed began by observing that the principal problem with previous federal enforcement of the Sherman Act was the Justice Department's "failure to insist upon a real dissolution of monopolies and combinations." 51 Cong. Rec. S14527 (daily ed. Sept. 1, 1914). He then stated that the purpose of his proposal was to ensure that "hereafter when we shall *prosecute* a combination . . . there shall be a real and not a pretended dissolution." *Id.*; see also 51 Cong. Rec. S15864 (daily ed. Sept. 28, 1914) (Senator Reed) (purpose of section 25 was to ensure that a "real" dissolution is effected in suits brought by the Department of Justice). This description suggests that Senator Reed, as well as most of the Senators who voted in favor of the original version of section 25, understood that it would be limited to suits brought by the federal government.

C. Congress Reaffirmed In 1976 That Non-Federal Plaintiffs Do Not And Should Not Have The Authority To Seek Post Hoc Structural Remedies.

Petitioner's view of Congress's intent in enacting section 16 is further undermined by the history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Among other things, that Act granted to states statutory

[26] Indeed, Brandeis had proposed a similar provision during the hearings, not as a way of limiting the dissolution remedy to the federal government, but as a way of "educating" the federal courts by making clear their authority to order divestiture in suits brought by the federal government. See *House Hearings* at 652.

parens patriae standing in treble damage actions for violations of the Sherman Act. See Pub. L. No. 94-435, § 301, 90 Stat. 1890 (1976). The Senate version of the bill, however, had granted states the authority to seek "monetary *and other relief*." S. 1284, 94th Cong., 1st Sess. § 401 (1976). The Senate report discussing this provision stated:

> Present section 16 of the Clayton Act allows private suitors "injunctive relief against threatened conduct that will cause loss or damage" by a violation of the antitrust laws (15 U.S.C. § 26). [*The Senate bill*] *is intended to insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment*, which may be appropriate remedies under certain circumstances, whether or not it fits within the traditional concept of "equitable relief" or "injunctive relief."

S. Rep. No. 803, 94th Cong., 2d Sess. 45 (1976) (emphasis added). The House version of the bill authorized only damages.

The conference committee sided with the House. Representative Rodino explained the conference committee's action as follows:

> [T]he compromise bill omits any reference to [injunctive relief] solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under [section 16]. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. Provision for [broader] equitable relief, that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that *State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10295-96 (Sept. 16, 1976) (emphasis added). Particularly in light of the fact that the Hart-Scott-Rodino Act was an amendment to the Clayton Act, the views of the 94th Congress as to the meaning of section 16 are entitled to substantial weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983); *Seatrain Ship-*

building Corp. v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *cf. Red Lion Broadcasting Corp.* v. *FCC*, 395 U.S. 367, 380-81 (1969). The statement by Representative Rodino, a sponsor of the Hart-Scott-Rodino Act, demonstrates that the 94th Congress understood the language of section 16 to preclude suits for divestiture and other post hoc equitable relief, and deliberately chose to leave it that way.

• • •

The legislative history of the Clayton Act thus proves that Congress unambiguously intended precisely what the language of section 16 unambiguously says—namely, that the equitable remedies available under that provision include only the power to prevent threatened illegal acts, not the power to undo completed transactions. Congress refused in 1914 to give that power to private parties (including State attorneys general) in part because Congress believed it could be safely conferred only upon the federal government. Indeed, Congress reaffirmed that policy conclusion—as well as its own prior understanding of section 16—in 1976 when it refused to grant State attorneys general the authority to sue for divestiture under the Hart-Scott-Rodino Act. In sum, Congress's consistent judgment has always been that, for anyone other than the federal government, the proper remedy for an already-completed antitrust violation is a treble damage action.

IV. Policy Considerations Counsel Against Interpreting Section 16 To Permit Non-Federal Plaintiffs To Seek Structural Relief.

Petitioner relies almost exclusively on "policy" arguments in favor of a broad reading of private injunctive authority under section 16. See Pet. Br. 10-37. But the question whether petitioner's interpretation of the statute is a good idea, as a matter of federal antitrust policy, is something that not only *should* be left to Congress, it *has* been decided by Congress on two occasions. And even if petitioner's policy arguments were appropriately addressed to this Court, they are unpersuasive,

for reasons explained below and by respondents' *amici*. Under petitioner's interpretation of section 16, all antitrust plaintiffs—including competitors, suppliers, customers and consumer groups as well as states—will be empowered to seek divestiture, dissolution and other post hoc structural remedies in every kind of antitrust case. The potential for abuse such a holding would create, its certain detrimental impact on federal merger enforcement, and the existence of ample alternative avenues (including state law) for redressing antitrust violations by non-federal plaintiffs, all compel the conclusion that Congress struck the proper balance in 1914 and in 1976, when it limited such remedies to federal enforcement actions.

1. What is most striking about petitioner's policy arguments is their similarity to the arguments unsuccessfully advanced during the congressional deliberations that led to the Clayton and Hart-Scott-Rodino Acts. Like petitioner, Messrs. Untermyer and Rogers argued that private plaintiffs should have the authority to seek post hoc structural relief because a prohibitory injunction might not provide "complete relief" (Pet. Br. 21) or be sufficient to "achieve the objectives" of the antitrust laws (Pet. Br. 14). See *supra* at 26-29. But Representative Carlin and others persuaded a majority in Congress that prohibitory relief would serve those objectives sufficiently, and that broader remedial authority would be too susceptible to abuse if placed in the hands of private plaintiffs. *Supra* at 29. Like petitioner, Senator Nelson argued that it would be unfair to give the federal government authority to seek affirmative remedies while depriving private plaintiffs of their "right to effective relief" (Pet. Br. 35) and denying them the ability to "address[] the structural nature" (Pet. Br. 21) of an already-completed antitrust violation. See *supra* at 35-36. But Brandeis and others persuaded a majority of Congress that it was entirely appropriate to give the federal government full responsibility for determining when post hoc structural relief should be sought. *Supra* at 29.

Like petitioner, moreover, Senator Reed argued that state attorneys general should be permitted to "fill the gaps" in federal antitrust enforcement (Pet. Br. 25, 27, 35)—and, indeed, to "serve as a check on" federal enforcement authorities (Pet. Br. 35). But Senators Gallinger and Lewis successfully argued that enforcement of the federal antitrust laws should be left to federal enforcement authorities, and that the crazy-quilt enforcement system proposed by petitioner could well lead to politically-motivated enforcement decisions that would "gr[ind the public] between the upper and the nether millstones." *Supra* at 33. Finally, like petitioner, some legislators argued in 1976 that state attorneys general should be given divestiture authority so that they could play a greater role in merger enforcement (Pet. Br. 29). *Supra* at 40-41. But Representative Rodino apparently persuaded a majority of the 94th Congress to reject that proposal as well. *Supra* at 41.

In sum, petitioner merely seeks to have this Court reconsider a divisive issue of antitrust policy that has *twice* been squarely addressed and decided by Congress—once in 1914, and again in 1976. Congress's repeated decisions not to grant any non-federal plaintiffs the same remedial authority as the federal government plainly disposes of petitioner's "policy" arguments. As this Court has previously observed, if "considerations of public policy counsel the extension of the Clayton Act, . . . it is a simple matter for Congress to say so clearly." *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 133 (1983).

2. This Court, moreover, has previously recognized that there are good reasons to "sharply distinguish" federal antitrust enforcement actions from private suits. *United States* v. *Borden*, 347 U.S. 514, 518 (1954). Only the federal government has both the resources and the responsibility to ensure that powerful, post hoc structural remedies such as divestiture and dissolution are properly administered and not abused. As this Court is well aware, antitrust decisionmaking by the federal courts requires difficult and delicate judgments concerning com-

petitive conditions and future economic performance. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963); Report of the Attorney General's National Committee to Study the Antitrust Laws, 356 (March 31, 1955); Areeda & Turner, *Antitrust Law* § 312a at 36-37 (1978). The need for well-informed and considered discretion is particularly great when the court considers a structural antitrust remedy, which can drastically affect not only the conduct and pocketbook of an individual defendant, but also the entire market. For this reason,

> [F]ar-reaching rules of antitrust liability make sense and are administrable in practice only when there is a responsible filtering of (1) the cases presented to the court or (2) the company and industry reorganizations proposed. . . . [O]nce an antitrust violation has been found, the government is more likely than the private plaintiff to have the resources, the competence, and the motivation to propose wise remedies. This is especially important when dissolution or industry reorganization is in issue.

Areeda & Turner at 36-37 (1978). See also *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 348 (D. Mass. 1953).

Private divestiture suits would deprive the courts of the "responsible filtering" provided by the federal government.[27] A private suit for divestiture *after* federal approval and completion of an acquisition allows a competitor, or any other party, not only to threaten to destroy a transaction that may be vital to the corporation's economic future, but also to impose substantial unnecessary

[27] This case is illustrative: A merger between the second and third largest California grocery chains—Von's and Safeway's—was pending before the FTC at the same time as the Lucky/Alpha Beta merger at issue here, with both mergers producing virtually identical market shares. ER 616. The FTC's even-handed treatment was reflected in the fact that the agency required similar numbers of divestitures in both cases. The California Attorney General, however, inexplicably chose to challenge the Lucky/Alpha Beta merger while refusing to challenge the Von's/Safeway merger.

costs.[28] Even if the defendant corporation is confident that the merger is procompetitive and that it will eventually prevail in litigation, the uncertain promise of a future victory does "not prevent the error that is introduced when the threat of litigation by an improperly motivated plaintiff causes the parties to forgo or modify transactions." ABA Antitrust Section: Monograph No. 16, Private Litigation Under Section 7 of the Clayton Act: Law and Policy 81 (1989). See Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 267 (1985). The nuisance value of a lawsuit, moreover, is infinitely greater when the remedy sought is not mere money damages, but the "undoing" of a major transaction or, indeed, the complete dissolution of the defendant. And the threat of litigation becomes unbearable when a newly-merged company faces the possibility of *seriatim* divestiture actions by numerous plaintiffs in every state in which the company does business, as it would if the divestiture remedy were extended to all plaintiffs.

Indeed, the California Attorney General has correctly observed that, if he is successful in this case, "consumers' representatives across the country will be able to go to court to undo illegal mergers." Washington Post, Oct. 17, 1989, at D6, col. 3. Of course, that means that "consumers' representatives"—each with his or her own agenda

[28] Obviously, a suit to halt a merger prior to completion gives rise to *some* of the same concerns. But, when a merger is interrupted by litigation before it has been completed, the costs to the company are much lower because the acquiring company has not yet purchased the acquired company, for which it frequently pays a premium. And other social costs, including the disruption to the company's employees, are reduced when antitrust challenges are aired before the merger. In this case, for example, had the complaint and request for injunctive relief been filed prior to approval of the consent decree, respondent certainly would not have divested itself of assets necessary to operate Lucky and Alpha Beta as separate, viable grocery chains. See *supra* at 4 n. 3. Thus, the CAG's decision to delay a lawsuit until after the merger will (if the CAG ultimately prevails) necessarily leave one or both of the merging chains financially weaker than before the merger.

and antitrust theory—also will be able to go to court to *threaten* to undo mergers. Given the imprecise nature of antitrust decisionmaking, the complex economic and legal judgments involved, and the "public importance of pre-litigation fact-finding and the exercise of discretion by the public 'prosecutor' " (Areeda & Turner, § 312d at 40), this Court should preserve the distinction Congress created between the remedial authority of the federal government and that of all other plaintiffs.

3. Failure to limit the structural remedies of dissolution and divestiture to cases brought by the United States would also have a substantial and detrimental impact on federal merger enforcement under the Hart-Scott-Rodino Act. To a large degree, the present ability of federal antitrust authorities to negotiate a settlement derives from the fact that they have the final word on whether a transaction will be challenged after the fact. If every private plaintiff, state attorney general and public interest group shared the federal government's ability to "undo" a transaction, the federal government's bargaining power in such negotiations would be substantially reduced.[29] Such a result would also destroy the predictability in merger enforcement which Congress sought to provide when it enacted the Hart-Scott-Rodino Act. See S. Rep. No. 803, 94th Cong., 2d Sess. 65 (1976); H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11 (1976).

There is no merit to petitioner's argument that overruling the Ninth Circuit's no-divestiture rule will further

[29] This case illustrates the point: If respondents had known that they could be subject to a suit for divestiture after consummating their merger (contrary to well established Ninth Circuit law), they could not rationally have agreed to a consent agreement requiring them to divest substantial numbers of stores. As previously noted (*supra* at 4 n. 3), the divestiture of respondents' stores pursuant to the FTC consent agreement made it financially impossible to maintain two separate grocery chains. A prompt integration of the two chains was therefore essential to respondents' willingness to reach agreement with the FTC.

the aims of that Act. Contrary to petitioner's suggestions (Pet. Br. 35, 36 & n. 15), the no-divestiture rule does not force private litigants to ignore the Hart-Scott-Rodino premerger review process. As a practical matter, it simply requires all interested parties to negotiate and reach agreement before the merger is consummated. Nor is there any reason to permit private parties to use divestiture suits as a way of "punishing" (Pet. Br. 29) those who violate the Act. The Act itself provides ample civil penalties for violations. See 15 U.S.C. § 18A(g); von Kalinowski, *Antitrust Laws and Trade Regulation* § 20.07[2] (1989) (discussing penalty cases brought by Justice Department). Nor is there any evidence that federal enforcement agencies are "overwhelmed" (Pet. Br. 30) by their premerger review responsibility. *This* case, for one, received full review by the FTC, but petitioner simply disagreed with the FTC's decision. This case thus illustrates the balkanization of merger enforcement that can result from the application of divergent economic and social theories of antitrust policy by federal and state officials—a balkanization that becomes intolerable when an already-completed transaction is at stake. See Rill, *Antitrust: Where We Stand Today*, 57 Antitrust L.J. 3, 6 (1988) (article by Assistant Attorney General, Antitrust Division).

4. Contrary to petitioner's submission (Pet. Br. 14-37), a decision rejecting the interpretation of section 16 urged by petitioner in no way leaves plaintiffs with legitimate antitrust claims unable to protect their interests. Private plaintiffs remain free to seek treble damages. They also remain free, under section 16, to enjoin any *threatened* conduct that they believe may cause them injury, including a threatened merger. All that non-federal plaintiffs are precluded from seeking is broad, post hoc structural relief such as dissolution or divestiture. And the federal government, of course, remains free to challenge the merger or acquisition at any time. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). See also Respondents' Brief In Opposition 16-19

(Sept. 20, 1989) (explaining why post-merger divestiture unnecessary to protect legitimate interests of private litigants).

Nor does a ruling in this case that section 16 does not grant mandatory relief or in any way preclude the State of California—or any other state—from granting such relief under state law. This case, therefore, involves no issue of federalism. *If* the remedy of divestiture truly is a necessary weapon in the California Attorney General's antitrust arsenal, the California legislature should be willing to enact legislation granting that remedy to him.[39] If such a remedy is to be granted under federal law, however, it must be granted by Congress.

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[39] Indeed, the California Attorney General recently proposed legislation that would have extended California's antitrust law to mergers and would have permitted the CAG to seek divestiture. See A.B. 672, 1989-1990 Cal. Reg. Sess. That proposal, however, was defeated in committee. Several state laws presently contain such provisions, however, and those laws have been applied by state attorneys general to obtain divestiture. See ABA Antitrust Section, Monograph No. 15, Antitrust Federalism: The Role of State Law, 61-62 (1988); *Texas* v. *Coca-Cola Bottling Co.*, 697 S.W.2d 677 (Tex. App. 1985); Me. Rev. Stat. Ann. tit. 10, § 1104(2) (1989 Cum. Supp.) (state statute virtually identical to section 15). According to petitioner, antitrust enforcement (including actions seeking divestiture) under state law has been "vigorous." Pet. Br. 28. Respondents express no views as to the propriety or constitutionality of such state statutes.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

American Stores urges the Court to rewrite section 16 of the Clayton Act to prohibit any affirmative equitable relief from the injury threatened by violations of the antitrust laws, including section 7 of the Clayton Act. American Stores discusses none of the prior decisions of this Court, including *Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), that would be overruled, *sub silentio*, by its proposed revision of section 16. American Stores' argument omits the most significant portions of the legislative history of the Clayton and Hart-Scott-Rodino Acts and misconstrues contemporaneous judicial interpretations of the Clayton Act.

To rationalize the principle that divestiture is not available to plaintiffs under section 16 of the Clayton Act, respondents advance a remarkable new proposition: that the phrase "injunctive relief" in the statute really means only "*prohibitory* injunctive relief" and that the federal courts may not grant *mandatory* injunctions under the statute. (Brief for Respondents ("BR") at 11.) American Stores asserts that in private actions the only "proper remedy for an already completed antitrust violation is a treble-damage action." (*Id.*, at 42.)

There should be no mistake about the devastation that rule would wreak on private enforcement of the antitrust laws. Not merely merger-law enforcement under section 7 of the Clayton Act is at stake. Section 16 is the instrument for private enforcement of all of the antitrust laws. If American Stores is right, a private plaintiff victimized by monopolization could not secure structural relief from the violation of section 2 of the Sherman Act; a victim of such *per se violations* as tying and group boycotts could not secure relief compelling the offenders to rescind the unlawful contracts or restore pre-violation competitive conditions. Once the ink was dry on any antitrust violation, courts of equity would be powerless to enforce the antitrust laws.

Fortunately, neither the language of section 16 nor its legislative history support this remarkable claim -- a claim that would overturn seventy-five years of antitrust precedent. Congress did intend the courts to exercise the full extent of their equitable powers to prevent "threatened loss or injury" caused by completed violations of the antitrust laws, and it gave effect to that intent in section 16.

I. THE LANGUAGE OF SECTION 16 DOES NOT RESTRICT THE COURTS' EQUITABLE POWERS

American Stores refuses to recognize that section 16 provides "injunctive relief against . . . threatened loss or damage *by a violation of the antitrust laws*." While section 16 requires that the *injury* flowing from unlawful conduct must be "threatened," there is no requirement in section 16 that the *antitrust violation* itself must be prospective. Notwithstanding American Stores' effort to revise the statutory language (e.g., BR at 19, 42), section 16 explicitly contemplates that injunctions will issue to prevent past or continuing antitrust violations from causing future injury.

That is precisely the situation facing California here. The District Court found, and the Court of Appeals affirmed, that California consumers were "threatened" with "irreparable loss or damage" as a result of American Stores' acquisition of Lucky Stores "in violation of the antitrust laws." (Pet. App. B at B24-B25; Pet. App. A at A16.) The "threatened loss" is the millions of dollars California consumers will pay due to reduced competition made possible in part by American Stores' "threatened conduct" in exercising the unlawful market power this merger would give it. (Pet. App. B at B19-B24.)[1]

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1. Indeed, given the posture of this case, the "threatened conduct" also includes completion of the Lucky and Alpha Beta merger. Respondent wrongly claims that California does not challenge the Ninth Circuit's finding that the Lucky merger was completed on June 9, 1988. (BR 7, n. 5.) The purchase of the Lucky stock that was not tendered was accomplished on that date by a short-form merger under Delaware law. But if the FTC hold-

American Stores challenges California to "explain the meaning of the limiting phrases 'threatened loss or damage' and 'threatened conduct that will cause loss or damage.'" (BR 13.) Both phrases simply reflect the traditional requirement for injunctive relief that equity courts have imposed: an injunction will not be granted absent the threat of future loss. As Justice Stone explained in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945):

> "The section [§ 16] provides that the relief to be given is an injunction 'against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .' And even though, as asserted, the suit be maintainable in federal courts independently of the Clayton Act, the *controlling principles governing the maintenance of the suit are the same in either case. The plaintiff must show threatened injury* [citations], *for which he is without other adequate remedy* [citations], *and for which a court of equity is able to provide a remedy.*" (Dissenting opinion; emphasis added.)[2]

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separate order and the preliminary injunction in this case mean anything, the merger of Lucky and Alpha Beta is not complete. (Petition App. B at B21.) Even were the Court to conclude that "mandatory" relief was not available under section 16, it would still have to reverse the decision below because a permanent injunction prohibiting the integration of Lucky and Alpha Beta is indisputably *prohibitory* in nature.

2. The majority disagreed with Justice Stone on whether Georgia's citizens faced irreparable injury, but not with his construction of section 16. The Court's agreement with these basic principles led it to conclude that "[d]issolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here. If the alleged combination is shown to exist, the

Nor is it any great mystery why these phrases are not included in section 15, which authorizes equitable actions by the federal government. Section 15 was simply a reenactment of section 7 of the original Sherman Act. (S.Rep. No. 698, 63rd Cong., 2d Sess. 50 (July 22, 1914).) The failure to include language limiting section 15 actions to those threatening the federal government with injury reflects the fact that the government is empowered to seek relief from violations of the antitrust laws irrespective of any injury from such violations. (*General Inv. Co. v. Lake Shore Ry.*, 260 U.S. 261, 286-87 (1922).) Private litigants, on the other hand, must show threatened injury. The phrase "threatened loss or damage" simply imposes a traditional standing limit on the rights of injured persons to sue, as do many other statutes creating important federal rights. (See, e.g., 15 U.S.C. § 15; 12 U.S.C. § 1464(q)(2)(A); 12 U.S.C. § 1976; 18 U.S.C. § 1964.)

Comparing the language of section 16 with that of section 15 refutes respondents' contrived distinction between the availability of "prohibitory" and "mandatory" relief under section 16. (BR 8, 13-19.) American Stores incorrectly claims that "section 15 of the Act authorizes the federal government, *without qualification*, to commence any 'proceedings in equity' to remedy a violation of the antitrust laws." (BR 12 (emphasis added).) To the contrary, section 15 expressly limits the federal government to relief in equity that will "prevent or restrain" violations of the law. (15 U.S.C. § 25.) Despite this overt limitation, American Stores concedes that the federal government may obtain "post hoc structural relief" under section 15, including divestiture.[3]

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decree which can be entered will be no idle or futile gesture. It will restore the degree of competition envisaged by Congress . . . ." (324 U.S. at 462.)

3. Contrary to respondents' claim (BR 12, n. 7), section 13(b) of the Federal Trade Commission Act expressly limits the courts' power to afford relief to the Commission to "issu[ing] a permanent injunction." (15 U.S.C. § 53 (b); see *FTC v. Dean Foods Co.*, 384 U.S. 597, 605-12 (1966).) Section 13(b) was added to the FTC Act by the Trans-Alaska Pipeline Act of 1973, Pub. Law No. 93-153, Tit. IV, § 408, 87 Stat. 591 (15 U.S.C. § 53(b)) in response to the *Dean Foods* case. (*Kintner* at 4950, n.10-8.) The history of this section shows that Congress knows how to restrict the courts' equitable powers when it desires to do so. Congress' failure to impose such clear restrictions in section 16 thus invokes the doctrine of *Porter v. Warner Co.*, 328 U.S. 395 (1946), as California urged. (Brief for Pet. at 12-14.)

(BR 11, 44-45; see *United States v. du Pont & Co.*, 366 U.S. 316 (1961).)

Unlike section 15, section 16 contains no language limiting its relief to that which would "prevent or restrain" violations. The "threatened loss" language in section 16 is surely no more limiting than the "prevent or restrain" restriction found in section 15. Indeed, this Court has equated the authority of the courts to provide effective relief under the two sections. (*General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 287.) American Stores' concession that divestiture is available under section 15 therefore puts to rest the strained distinction between "preventive" and "affirmative" relief under section 16.[4]

II. CONGRESS DID NOT INTEND TO LIMIT EQUITABLE REMEDIES UNDER SECTION 16

Respondents' argument for limiting the relief available under section 16 is fundamentally at odds with the statute's language and purpose. (BR 22-42.) The argument misinterprets the fragments of legislative history on which it

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4. This distinction, more semantic than substantive (see *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)), lost its force in the antitrust arena long ago. (*United States v. American Tobacco Co.*, 221 U.S. 106 (1911).) Such traditional equitable distinctions, developed in a system with separate law and equity judges, have little relevance to the modern practices of federal courts. (*Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___ U.S. ___, 108 S.Ct. 1133, 1140-42 (1988).)

is based and gives a false sense of the tenor of the debates leading to adoption of the Clayton Act.

A. The Fundamental Debate in 1914 Was How Best to Address Inadequate Antitrust Enforcement by the Federal Government

Passage of the Clayton Act in 1914 culminated fourteen years of Congressional dissatisfaction with enforcement of the Sherman Act.[5] (E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* at 996 (1978) ("*Kintner*.")) To address this deficiency, Congress believed that the citizenry should be enlisted in the fight against the trusts. Congress did so and armed private litigants with the same right to injunctive relief it had conferred on the government. By the same token, Congress did not want to excuse the federal government from its duty to enforce the antitrust laws. To understand the legislative debates, therefore, one must realize that Congress' objective was to strengthen private enforcement without interfering with federal efforts.

B. The Debates on the Clayton Act Do Not Support Respondents' Limits on Section 16

1. Most of American Stores' legislative history argument rests on selected remarks in the hearings before a subcommittee of the House Judiciary Committee in February 1914. (BR 23-31.) The remarks concerned what was then section 13 of one bill, which American Stores says was adopted as section 16 of the Clayton Act with "minor irrelevant modification." (BR 13.)

What respondents dismiss as "irrelevant," however, is a fundamental difference between the bill before the committee and section 16 as enacted. The bill in question proposed amendments to the *Sherman Act* and would have

5. See, e.g., remarks of Rep. Clayton: "The Attorney-General can see no difference between ordinary business and an act which was a crime at common-law and has remained a crime for centuries." (33 Cong.Rec. A330 (1900).)

added section 13 to provide injunctive relief against unreasonable restraints of trade violating *that act*. The bill had no provision regarding anti-competitive mergers comparable to section 7 of the Clayton Act.[6] (*Kintner* at 1074-76.)

Divestiture is, as this court has long taught, a particularly appropriate remedy for a merger made unlawful under the incipiency standard of section 7. Passing remarks early in the consideration by one subcommittee of a bill dealing with remedies for private enforcement in an altogether different context are thus of scant relevance in interpreting the Clayton Act, which enacted entirely new substantive rules governing unlawful mergers.[7]

6. The bill referred to by respondents was one of four bills being considered by the subcommittee. The bill containing section 13 proposed amendments to the Sherman Act. Section 13 read:

> "That any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation *of this Act* when and under the same principles as injunctive relief against threatened conduct . . . is granted by courts of equity." (*Kintner* at 1075-76, emphasis added.)

As amended by the Senate and concurred in by the House, Clayton Act section 16 read:

> "That any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage *by a violation of the antitrust laws, including sections two, three, seven and eight of this Act* . . . ." (*Kintner* at 1067, emphasis added.)

7. All of the legislative history references cited by respondents concern the remedy of dissolution, not divestiture. There is a significant difference between the two remedies, however. (See *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985).) The debates in 1914 make clear that Congress understood "dissolution" to mean the total destruction of offending trusts. (See, e.g., 51 Cong.Rec. S15863-64 (Sept. 29, 1914), Rep. Reed.) "Dissolution" is simply not the same as "divestiture," as this case proves. California is not suggesting the dissolution of American Stores, Lucky or Alpha Beta. Dissolution of the trusts discussed in the debates meant dissolving the corporations which had been brought under the umbrella of the great combinations such as the

2. The balance of respondents' citations to the legislative history are similarly flawed, reflecting either illustrative comments American Stores would make into legislative limits or quotations taken wholly out of context.

Illustrations, not Limits. Several times, American Stores quotes remarks illustrating how the bill would work as if they stated the outer limits of the bill's potency. For example, American Stores quotes three statements describing how section 16 would permit a private plaintiff to obtain an injunction against violations of the law (BR 31 (Rep. McGillicuddy), BR 34-35 (Rep. Floyd), BR 35, n.23 (Rep. Webb)), from which it concludes that the statute can *only* be used to restrain the "doing" of unlawful acts, rather than to prevent threatened loss resulting from such violations. While the Congressmen's statements accurately describe how a plaintiff might use section 16, they reflect no intent to *limit* the section's availability to those circumstances.

Mischaracterization of Sen. Nelson's Remarks. California noted in its opening brief that Sens. Nelson and Shields specifically stated during the debate immediately prior to passage of the Clayton Act that section 16 gave private plaintiffs the same remedies that were available to the federal government. (Brief for the Petitioner at 37-42.) American Stores seeks to avoid that devastating history by quoting a passage from Sen. Nelson that did not refer at all to section 16, but to a proposed section 24 regarding the power of the government to enforce its injunctions in

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Standard Oil trust. That is a far cry from making an acquiring firm divest the target company where, as here, it has held the target company under a hold-separate order since the acquisition. Even if "dissolution" were a generic term incorporating divestiture, as respondents claim, opposition by some members of Congress to the broader remedy of dissolution does not at all imply their opposition to divestiture, itself.

contempt proceedings.[8] (BR 35-36.) In the very same speech, Sen. Nelson made it clear that section 16 supported an injunction against completed acts such as an "existing" trust or monopoly. (51 Cong.Rec. S15944 (Sept. 30, 1914).) He told the Senate that it was particularly applicable to violations of section 7 of the Clayton Act. (*Ibid.*)

The House members who discussed section 16 during its debates on the conference bill agreed with Sen. Nelson. (E.g., 51 Cong.Rec. 16275 (Oct. 7, 1914), Rep. Webb; 51 Cong.Rec. 16276 (Oct. 7, 1914), Rep. Hardy.) During the final House debate, section 16 was said to confer on private litigants the power to seek relief "closing down" illegal operations, and the Representatives were assured that the measure was "as strong in civil remedies as a bill can be made." (51 Cong.Rec. 16276 (Oct. 7, 1914), Rep. Hardy and Rep. Webb.) The relief available to private parties under section 16 was again equated to that available to the federal government under section 15. (*Id.*, at 16276 (Oct. 7, 1914) Rep. Webb ("the remedies pile up, and all of the remedies are open to the individual and to the

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8. The focus of Sen. Nelson's remarks becomes clear when they are set forth in their correct context of his discussion of *In re Debs*, 158 U.S. 564 (1895). Sen. Nelson was complaining that section 24 appears to limit the rights of private litigants to seek contempt for violations of injunctions in ways the government was not limited:

> "The Debs case was a case on the part of the United States. If the provisions of section 24 as they are now had been in force at that time, it would not have changed the situation. This bill in section 24, does not change existing law in the manner of contempts where the United States is a party. It is only in suits of private parties; and those are very far and few between under the antitrust laws.
>
> "Does it not strike you, Senators, as a little unfair that by section 16 of this bill you have for the first time given private individuals the right to go into court and get injunctive relief as the Federal Government can get it, and then, after having given private individuals this remedy by injunction, you deprive them of the part of the remedies that the Federal has in a suit instituted by it." (51 Cong.Rec. S15946 (Sept. 30, 1914).)

Government. . . .").) Following these remarks, the bill was enacted unchanged. (51 Cong.Rec. S16170 (Oct. 5, 1914); 51 Cong.Rec. H16344 (Oct. 8, 1914).)

3. American Stores points out that Congress rejected an amendment to the Clayton bill proposed by Sen. Reed authorizing state attorneys general to "bring suit in the name of the United States to enforce any of the antitrust laws." (51 Cong.Rec. S14476 (August 31, 1914).) American Stores, however, fails to reveal the true nature of that amendment and the reason for its rejection.

Sen. Reed's purpose was to authorize the states to initiate *criminal* prosecutions in the name of the federal government because he was dissatisfied with the lack of federal criminal prosecutions under the Sherman Act. (51 Cong.Rec. S14519 ("[Sherman Antitrust Act] enacted over 20 years ago; since that time hundreds, if not thousands, of combinations in restraint of trade have been formed; and in all that time there has not yet been one man put behind the bars of a jail or of a penitentiary . . ."); see also, S14476 (Mr. Gallinger), S14478 (Mr. Walsh), S14515 (Smith), S14517 (Mr. Chilton), S14517 (Mr. Shafroth).) This Court noted in *Georgia v. Evans*, 316 U.S. 159, 162, n.1 (1942) that the Senate rejected the Reed amendment out of concern over permitting state officials to bring criminal prosecutions under federal law, not out of any desire to curtail the states' authority to obtain effective civil relief. (51 Cong.Rec. S14526-27.)

C. THE HART-SCOTT-RODINO ACT WAS NOT INTENDED TO RESTRICT RELIEF AVAILABLE UNDER SECTION 16

American Stores uses an equally unsatisfactory discussion of the history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) to suggest that Congress renewed the alleged limits under section 16 preventing mandatory injunctive relief. In fact, just the opposite is true -- both the House and the Senate expressly acknowledged that they were leaving section 16 jurisprudence unchanged.

Respondents urge the Court to give dispositive weight to the remarks of Rep. Rodino, claiming that the House Conferences rejected private actions for divestiture.[9] (BR 40-42) However, respondents fail to mention that the Senate expressly rejected Rep. Rodino's views. (122 Cong.Rec. S15417 (Sept. 8, 1976).) Sen. Hart, the Senate co-sponsor, explained the impact of the House changes from the Senate version dealing with injunctive relief as follows:

> "The House supported the concept of State attorneys general being able to get injunctions to halt antitrust violations which were injuring their consumers, but the House felt that the Supreme Court's decision in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) clearly authorized *parens patriae* suits for injunctive relief under section 16 of the Clayton Act.
>
> "The Byrd motion drops any mention of other than monetary relief because of the Senate concurrence with the House with respect to the right of the States to obtain appropriate relief under section 16 pursuant to the *Georgia* decision." (122 Cong.Rec. S15417.)

Georgia, of course, held that "[d]issolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in antitrust suits." (324 U.S. at 462.) California seeks no more in this case.

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9. Respondents and their *amici* all erroneously assert that Rep. Rodino was speaking on behalf of a "conference committee." (BR 41; UFCW Brief 10; BT Brief 7; CRA Brief 9, n.5.) In fact there was no conference committee because the Senate refused to appoint conferees for fear that the debate over any resulting conference recommendations would provide another opportunity for the opponents of the HSR Act to filibuster the bill into defeat. (122 Cong.Rec. S29163-64 (Sept. 7, 1976), Sen. G. Hart.)

III. MANDATORY INJUNCTIONS HAVE LONG BEEN AVAILABLE UNDER SECTION 16

The ruling American Stores seeks in this case would overturn decades of section 16 jurisprudence permitting mandatory injunctive relief. For example, in *Zenith Corp. v. Hazeltine, supra*, 395 U.S. 100 (1969), the Court held that granting exclusive patent licenses to foreign patent pools, which restricted imports of plaintiff's products into foreign countries, violated section 1 of the Sherman Act. (395 U.S. at 105-106.) The Court concluded that a mandatory injunction to redress the continuing harm threatened by that violation was appropriate.[10] (395 U.S. at 129-33.) *Zenith* provides the framework for construing section 16:

> "That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, [citation]; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." (395 U.S. at 130.)

The Court applied the same principles in *Silver v. New York Stock Exchange, supra*, 373 U.S. 341, 365 (1963), holding that the failure of the New York Stock Exchange to afford fair procedures before terminating wire services to non-member firms violated section 1 of the Sherman Act. That violation rendered the Exchange liable to the plaintiff for past damages under section 4 and for injunctive relief under section 16 of the Clayton Act. (*Ibid.*) The Court

10. The relief granted in *Zenith* plainly is mandatory since Hazeltine could comply with the injunction only by dissolving its exclusive licensing agreements with the foreign pools. (395 U.S. at 129-30.) The injunction also mandated Hazeltine to license patents to Zenith without certain unlawful conditions under section 16 based on patent misuse. (*id.*, at 130-34.) Such relief is, of course, essential if the private action is to continue playing a "central role" in enforcing the competitive regime contemplated by Congress. (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985).)

ordered injunctive relief requiring the Exchange to provide "notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right" (373 U.S. at 364, n.17), relief that can scarcely be called "preventive."

Zenith and *Silver* were not revolutionary departures from this Court's section 16 jurisprudence. A long line of cases equates the relief afforded by section 16 to that afforded the federal agencies under section 15 of the Act. (See *Hawaii v. Standard Oil Co., supra*, 405 U.S. 251, 261; *General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 286-87; *FTC v. Dean Foods Co.*, 384 U.S. 597, 615 (1966) (dis. opn.); *Tigner v. Texas*, 310 U.S. 141, 148 (1940).)

These cases interpreting the scope of section 16 accord with two centuries of this Court's equity jurisprudence. Since *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 350 (1792), the Court has insisted that once the courts' equitable powers are properly invoked, they may exercise the full breadth of those powers to ensure effective relief. (*Clark v. Smith*, 38 U.S. (13 Pet.) 195, 202-203 [13 Pet. 173] (1839).) The Court has been vigilant in preserving the power of Article III courts to enforce federal rights ever since. (*Hayburn's Case*, 2 U.S. (2 Dall.) 355 (1792); *Brown v. Swann*, 35 U.S. 331 (1836); *Porter v. Warner Co., supra*, 328 U.S. 395 (1946); *TVA v. Hill*, 437 U.S. 153, 193-95 (1978).)

The courts may order mandatory injunctions when necessary to preserve federally created rights. (*In Re Lennon*, 166 U.S. 548, 556 (1897).) This is true whether or not the statutory scheme creating federal rights expressly confers a private right to equitable relief and irrespective of the precise language of the statute conferring equitable powers on the courts. In *J.I. Case Co. v. Borak*, 377 U.S. 426, 431-35 (1964), the Court rejected the argument that section 27 of the Securities Exchange Act of 1934, which authorized courts "to enjoin any violation" of the act, was limited to prospective relief; rather, the section was held to incorporate a private right of action for individuals injured by violations and, specifically, to *permit courts to rescind completed merger transactions*. The Court noted:

"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 327 U.S. 678, 684 (1946)." (377 U.S. at 433.)

Accord, *Mills v. Electric Auto-Lite*, 396 U.S. 375, 386-89 (1970); cf. *Deckert v. Independence Corp.*, 311 U.S. 282, 288-90 (1940).) That principle applies equally to section 16.

IV. EARLY JUDICIAL CONSTRUCTION OF SECTION 16 DOES NOT SUPPORT THE LIMITS ON SECTION 16 URGED BY AMERICAN STORES

American Stores' attempt to revise history is nowhere more clearly shown than in its treatment of the first three decisions of this Court construing section 16. (*Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29 (1916); *Duplex Co. v. Deering*, 254 U.S. 443, 464 (1921); *General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 286; BR 8, 19-20.) In *Fleitmann*, the Court did not hold that section 16 precluded restitution or was even limited to "preventive" relief as American Stores suggests. (BR 19.) Rather, the Court held that shareholders of a corporation could not assert the corporation's right to seek treble-damages by the mechanism of a derivative action. (240 U.S. at 28-29.) The Court grounded its conclusion solely on the fact that such a use of the equity court would deprive the defendants of their right to a trial by jury. (*Ibid.*)

American Stores' claim that the Court in *Duplex Co. v. Deering* applied section 16 retroactively because "the statute applied only to prevent future acts" is likewise not true. The Court held that plaintiffs were entitled to injunctive relief against threatened injury resulting from an ongoing secondary boycott in an action filed prior to passage of the Clayton Act. (254 U.S. at 464, 478-79.) The Court never

mentions or even suggests that section 16 is limited to injunctions restraining only future acts.[11]

Respondent is equally wrong in its assertion that *General Inv. Co. v. Lake Shore Ry.* held that "section 16 enables plaintiffs threatened with loss or damage to maintain suits to 'enjoin' (i.e. prevent) *threatened violations*."[12] (BR 20, emphasis added.) Far from supporting American Stores' crabbed construction of section 16, *General Inv. Co.* confirms the broad injunctive powers of the district court under that statute. The Court equated the remedies available to private litigants under section 16 with the remedies available to the government under section 15. (260 U.S. at 286-87.) Regarding the private remedy, the Court said it "enabl[ed] persons and corporations threatened with loss or damage through *violations of that act to maintain suits to enjoin such violations*, . . ." (260 U.S. at 287, emphasis added.) Clearly, the authority to "enjoin such violations" under section 16 is precisely the same authority given to district courts under section 15 to "prevent and restrain violations."[13]

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11. The Court did say that section 16 operates "in futuro," an apparent reference to the phrase "against threatened loss or damage." (BR 20.) But that simply means that only future irreparable injury may be addressed by courts of equity; past injury capable of measurement is compensable by damages.

12. The Court in *General Inv. Co.* never uses the expression "threatened violations," as American Stores claims. (BR 20.) Indeed, the Court — like the statute — referred to "threatened . . . loss or damage," a very different requirement. (See *supra*, at 2-3.) This Court recently condemned similar efforts to modify the clear import of authorities by misleading additions of words to the text. (*Associated General Contractors v. Carpenters*, 459 U.S. 519, 525 n.9 (1983).)

13. The three lower court decisions cited by respondents do not support their argument. (*Venner v. Pennsylvania Steel Co.*, 250 F. 292 (D.N.J. 1918); *Graves v. Cambria Steel Co.*, 298 F. 761 (D.N.Y. 1924); *Continental Securities Co. v. Michigan Cent. R. Co.*, 16

V. THE POLICIES UNDERLYING THE NATION'S ANTITRUST LAWS REQUIRE PERMITTING DIVESTITURE IN PRIVATE ACTIONS

The policy arguments advanced by American Stores and its *amici* for precluding divestiture under section 16 must be rejected. Though couched in a variety of formulations, respondents' policy arguments all rest on a common refrain: allowing anyone other than the federal government to seek effective injunctive relief will be costly to merging firms. (BR 43-47; see also BT Brief 9-14.) At bottom, respondents challenge not just the right of private parties to obtain divestiture as a remedy, but the entire premise of private enforcement of the antitrust laws.

Congress was of a different view, well-aware that in authorizing private actions under section 16, it might be opening the door to multiple suits that could impose significant costs on merging firms. Indeed, for firms found to have violated section 7, that was one of the primary purposes of enlisting private citizens in the enforcement effort. (See 51 Cong.Rec. H16275 (Oct. 7, 1914), Rep. Webb: "Under the civil remedies any man throughout the United States, hundreds of thousands, can bring suit in various jurisdictions, and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket.") But even if the private action were not

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F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741 (1927).) The issue whether a person actually threatened with injury by a violation of section 7 could secure divestiture was not presented in any of the cases; all were shareholder-derivative actions brought by plaintiffs who failed to satisfy section 16's requirement of "threatened injury." Moreover, each case arose in the context of a demand for "dissolution," not divestiture of stock acquired in the face of a hold-separate order. (See note 10, *supra*.) Finally, none of the three discusses the legislative history or policies underlying section 16, an omission that led even the Ninth Circuit to reject them as persuasive precedent. (*International T. & T. Corp. v. General T. & E. Corp.*, 518 F.2d 913, 921 (9th Cir. 1975).)

always successful, Congress concluded that the incremental cost to merging firms was far outweighed by the benefits that effective private enforcement of the antitrust laws would produce for the country's economy.

1. Respondents' suggestion that allowing divestiture under section 16 will preclude "responsible filtering" by the federal agencies (BR 45-47) is little more than a plea for immunity buried in their effort to revisit the very issue Congress decided in 1914. "Filtering" deals only with the exercise of prosecutorial discretion by the federal agencies in allocating their own limited resources. Those agencies have never been authorized to "approve" mergers; they only decide whether to prosecute violations. Respondents, however, would like to convert this prosecutorial "filter" into a federal license immunizing all mergers that for one reason or another are not blocked by the federal government.

Implicit in respondents' "filtering" argument is the acknowledgement that Congress placed the ultimate responsibility for determining which mergers violate the antitrust laws not in the federal agencies, but in the courts. Yet, respondents and their *amici* display a grave mistrust of the courts' ability to use the myriad tools at their command, including summary dispositions and sanctions, both to weed out "irresponsible" cases and to determine the appropriateness of the divestiture remedy in any given case. Congress displayed no such mistrust.

Respondents clearly overstate the threat from private litigation, ignoring both the enormous expense such suits entail and the heavy burden of proof that a plaintiff must overcome in order to obtain divestiture. No authority is cited and none exists suggesting that the risk of "multiple and *seriatim*" lawsuits is genuine.

Perhaps most fundamentally, Congress itself was not satisfied with the federal "filtering" process. Indeed, that is precisely why section 16 was enacted -- to supplement the federal enforcement program with private actions. The findings of the courts below that the Lucky acquisition almost certainly violates section 7 and threatens irreparable

injury, despite the FTC consent order, demonstrates the value of such actions even when one of the federal agencies has acted. The federal enforcement authorities are not infallible. They do not have unlimited resources. They are often forced to settle for less than full compliance with section 7. They may make prosecutorial decisions based on views of antitrust policy that are at odds with settled precedent, or that reflect changing political or economic thinking not in conformance with the policies of the antitrust laws -- precisely the conditions that moved Congress to adopt the Clayton Act. These are all matters that Congress thoroughly considered, ultimately concluding that private actions were needed to insure effective enforcement of the antitrust laws.

2. The availability of a private divestiture remedy under section 16 in no way interferes with the federal merger enforcement program. Contrary to respondents' claims, these programs were not intended to guarantee "predictability in merger enforcement," nor do they provide federal antitrust enforcement authorities with "the final word on whether a transaction will be challenged after the fact." (BR 47.) In several circuits, divestiture has been an available remedy under section 16; as respondents themselves note (*id.* at 49 n.29), several states presently permit divestiture under state law. Yet respondents and their *amici* are unable to point to a single instance in which the availability of divestiture in these jurisdictions caused any of the claimed interference with federal enforcement.[14]

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14. Even in the absence of a divestiture remedy under section 16 or state law, merging firms would receive no assurance that their proposed transaction would not be upset by a private lawsuit. If, for example, California had filed this suit one day after American Stores and the Commission had published their tentative consent agreement, and had secured a preliminary injunction preventing the stock acquisition, all of the purported problems of interfering with the federal HSR Act review would still be implicated. Moreover, the district court would have been injected into that review even before the Commission made its final

The threat made by the Business Roundtable (BT) and the California Retailers Association (CRA) that their members will refuse to cooperate with the federal agencies if private parties are allowed any form of mandatory injunctive relief under section 16 (BT Brief at 13-15; CRA Brief at 6-16) must be rejected as both implausible and irrelevant. Surely, the *amici* do not expect this Court to believe that firms, facing objections by the Antitrust Division to their proposed mergers, would be reluctant to settle with the Division *solely* out of fear that another party might later file suit and convince a court that the government's settlement did not solve the structural antitrust concerns raised by the merger. And if a private party were able to convince the court of the need for additional relief, affirmative or otherwise, then the antitrust policies would have been well served -- not frustrated -- by the availability of the private divestiture remedy.

3. Finally, pervading respondents' entire policy argument is the suggestion that mergers necessarily involve

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determination. None of the purported difficulties regarding the consent agreement negotiations between the respondents and the Commission would have been solved either. Respondents still would have confronted the need to settle with the Commission over its complaint and with California over its complaint.

American Stores' assertion that substantial divestitures would have been avoided had they known that they might have faced subsequent claims for structural relief under section 16 is wrong. First, American Stores did not make substantial divestitures; in its consent decree with the Commission, it agreed to divest less than 7% of the California stores in a combined Lucky/Alpha Beta chain. Second, the threat of a private action under section 16 did not deter American Stores from reaching an agreement with the Commission; American Stores was willing to settle even though California repeatedly warned it that the tentative consent agreement was not adequate and that the state would bring suit. American Stores simply chose to ignore those warnings. (Pet. App B at B-23.) Thus, respondents would still have faced the necessity of negotiating with California and any other potential plaintiffs regardless of the availability of structural relief under section 16.

national economic policies and that therefore only the federal authorities should be allowed to address the structural relief questions raised by such transactions. (BR 46-49; BT Brief 9-14; 16-24.) The short answer to this claim is that it is simply wrong, at least with respect to this merger and many others that will confront the courts in the future. This merger specifically threatens California citizens with the injury that the lower courts found will result from the integration of Lucky and Alpha Beta. (Brief for the Petitioner 5-7.) All of the policies underlying the Clayton Act compel the conclusion that California should be allowed to secure whatever relief is necessary in order to prevent that injury from occurring. (*Id.*, 18-35.)

CONCLUSION

American Stores invites the Court to challenge the concurrent federal and private enforcement regime Congress so carefully drafted in 1914 and improved in 1976. In fact, respondents seek to emasculate that regime. As respondents would have it, the fourth largest firm in an essential industry in the nation's largest state can acquire the largest firm, the acknowledged low-price leader, for the purpose of commanding twenty-five cents out every supermarket dollar spent by Californians. American Stores claims immunity from judicial antitrust scrutiny of that merger because, in the space of 17 days, it secured the agreement of Lucky to the acquisition and the tentative non-reviewable decision of a federal agency not to press its acknowledged antitrust concerns with the merger. Only the Congress could allow such evasion of the policies of the Clayton Act. It has not done so, and neither should this Court. Accordingly, the decision below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 28, 1989, I served the within Reply Brief for the Petitioner in re: "State of California -v- American Stores Co., Alpha Beta acquisition" in the United States Supreme Court, October Term 1989, No. 89-258, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 1989, at Los Angeles, California.

Marysue Bushner

MARYSUE BUSHNER

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-258 (9)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,

Petitioner,

VS.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF OF 32 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The States of Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of California. The Amici States respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit in *California v. American Stores*[1] be reversed.

INTEREST OF THE AMICI STATES

States represent a significant force in antitrust enforcement. Even before the federal government had antitrust authority, the states were vigorously protecting this country's free enterprise system. By the time the Sherman Act was enacted, 21 states had already adopted antitrust statutes. *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 n.4 (1989).

The states' attorneys general are under a mandate to enforce federal and state antitrust laws, including Section 7 of the Clayton Act. The Amici States, therefore, have a substantial interest in seeing that federal court application of antitrust laws is consistent with underlying congressional intent, this Court's past decisions, and sound public policy.

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[1] *California v. American Stores Co.*, 872 F.2d 837 (9th Cir.), *cert. granted*, 110 S.Ct. 275 (U.S. October 16, 1989) (No. 89-258).

The Amici States support the State of California's contention that divestiture is a remedy available to states and private plaintiffs under Section 16 of the Clayton Act. In *California v. American Stores*, the Ninth Circuit held that divestiture is not available as a remedy to California as a private plaintiff. In so holding, the Ninth Circuit substantially impaired the ability of states and private plaintiffs to enforce the Clayton Act in the manner intended by Congress, and the court perpetuated a split among the circuits.

SUMMARY OF ARGUMENT

1. *American Stores* offends public policy and is contrary to the clear intent of Congress. In denying the divestiture remedy to the State of California, the Ninth Circuit draws an untenable distinction between the remedies afforded private and public plaintiffs. The distinction is especially arbitrary when one considers that the so-called "private" plaintiff in this case is a state, representing public rather than private interests.

2. This Court has recognized that divestiture is often the most effective remedy available to redress the anticompetitive effects of an illegal merger. A merger that violates the Clayton Act distorts the market. Only the divestiture remedy restores competition to its premerger status.

3. Congress intended states and private parties to play key roles in enforcing the Clayton Act. By denying states and private parties the only effective remedy, divestiture, *American Stores* severely limits the efficacy of such private enforcement actions, leaving enforcement of the Clayton Act solely in the hands of the federal government.

4. If this Court decides that the divestiture remedy should not be available to parties with purely private interests to vindicate, the remedy should nonetheless be available to states, such as California, which represent public rather than private interests. States, when acting in their *parens patriae* capacity, are "government" in the same sense as the Federal Department of Justice and the Federal Trade Commission and should be afforded the same remedies that are granted to the federal government, including divestiture.

ARGUMENT

I. CONGRESS INTENDED STATES AND PRIVATE PARTIES TO PLAY KEY ROLES IN ENFORCING THE CLAYTON ACT.

Section 7 of the Clayton Act prohibits the acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1989). Sections 4 and 16 of the Clayton Act provide for private rights of action.[2] 15 U.S.C. §§ 15 and 26 (1989). This Court has held that states have standing to bring *parens patriae* actions seeking injunctive relief under

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[2]Section 4 provides for treble damages, while Section 16 authorizes injunctive relief. Section 16 reads in part:

> Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

15 U.S.C. § 26 (1989)

Section 16 of the Clayton Act. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447-49, 65 S.Ct. 716, 721-22 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260, 92 S.Ct. 885, 890 (1972). Section 4C of the Clayton Act grants states the right to bring *parens patriae* damage actions on behalf of consumers in their states. 15 U.S.C. § 15C.

Private parties were given treble damage and injunctive remedies, in part, to serve the "high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580 (1969). "Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties and to enlist the business public as private attorneys general to aid the government in 'achieving the broad social object of the statute.'" *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 415 (1st Cir. 1985) (citation omitted). The significance Congress placed upon the private plaintiff injunctive remedy is reflected by the following statement made by one of the authors of the Clayton Act during consideration of the bill:

> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So . . . the committee, proposed to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. 9270 (daily ed. May 26, 1914) (statement of Rep. Carlin). Congress clearly intended that private parties would play an integral role in antitrust enforcement.

State attorneys general play a special role in this enforcement scheme. Many are charged under their respective state laws with powers and responsibilities similar to those granted by federal law to the Federal Trade Commission ("FTC") and the United States Department of Justice.[3] Additionally, state attorneys general are particularly well suited to investigate and prosecute mergers with predominantly local impact, given their knowledge of local business conditions and their responsibility to the citizens of their states. Congress recognized the special role state attorneys general should play in antitrust enforcement when it granted the state attorneys general the authority to bring federal *parens patriae* damage actions under the Clayton Act. 15 U.S.C. § 15C.

II. THE HOLDING IN *AMERICAN STORES* SEVERELY LIMITS THE EFFICACY OF PRIVATE ENFORCEMENT UNDER THE CLAYTON ACT, CONTRARY TO THE CLEAR INTENT OF CONGRESS.

The Ninth Circuit's decision in *American Stores* severely weakens the right of action granted to private parties and the states under the Clayton Act and

[3] *See, e.g.*, Ariz. Rev. Stat. § 44-1407 (1987); Cal. Bus. & Prof. Code § 16754 (1987); Fla. Stat. § 542.27 (1988); Mass. Gen. Law ch. 93, § 9 (1985); Minn. Stat. § 8.31 (1988); N.Y. Gen. Bus. Law § 342-9 (1988); Ohio Rev. Code § 1331.11 (1979); Tex. Bus. & Com. Code § 15.20 (1989).

perpetuates a split among the circuits.[4] In *American Stores*, the Court of Appeals held that "divestiture, whether direct or indirect, is not an available form of relief under Section 16 for a private party such as California." 872 F.2d at 845. The *American Stores* Court relied entirely upon earlier Ninth Circuit precedent. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355 (1976).

A. There Is No Credible Evidence To Indicate That Congress Intended To Deprive Private Plaintiffs Of The Divestiture Remedy.

In the *International Telephone & Telegraph Corp.* case, the Ninth Circuit concluded that the term "injunctive relief" contained in Section 16 was ambiguous. 518 F.2d at 921. It then determined, on the basis of "legislative history," that Congress had not intended divestiture as one of the equitable remedies available under Section 16 to private plaintiffs. *Id.* at 922.

The legislative history relied upon by the *IT&T* court consisted of two isolated statements made during

[4]In a 1985 decision, the First Circuit held that divestiture is a remedy available under Section 16 of the Clayton Act. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean Inc.*, 754 F.2d 404, 414 (1st Cir. 1985). Several lower courts have also held that the divestiture remedy is available to private parties. *Consolidated Gold Fields, PLC v. Anglo American Corp.*, 1989-1 Trade Cas. (CCH) Para. 68,536 (S.D.N.Y. 1989); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1255-56 (E.D. Pa. 1987); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F.Supp. 780, 797 (S.D. Tex. 1971), *aff'd on other grounds*, 476 F.2d 989 (5th Cir. 1973).

committee hearings.[5] *Id.* Neither statement referred to the remedy of divestiture. Both statements, instead, referred to dissolution. Nonetheless, the Ninth Circuit surmised that "if any specific equitable remedy was in the minds of the members of the committee" during consideration of the Clayton Act, that remedy was divestiture. *Id.* at 923. As the First Circuit Court of Appeals noted in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), "dissolution" has a much broader meaning than "divestiture." *Id.* at 421. At least two members of Congress "apparently equated dissolution with the complete destruction and reorganization of an offending corporation." *Id.* "Thus, even within Congress, there existed a difference of opinion as to what the remedy of dissolution entailed." *Id.* Congress, as a legislative body, therefore had no "clearly expressed legislative intent" to deprive a district court of the remedy of divestiture in a suit brought under Section 16 of the Clayton Act. *Id.* at 422. Without such a clearly expressed legislative intent, a court may not limit or displace a statute's meaning. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980).

When a court's equity jurisdiction is at stake, even more legislative clarity of contrary intent is required:

[5]The first was a statement made during Committee consideration of the Clayton Act by Congressman John Floyd: "We did not intend by Section [16] to give the individual the same power to bring a suit to dissolve the corporation that the Government has. . . . We discussed that very thoroughly among ourselves and we decided he should not have [it]." 518 F.2d at 922. The second statement, according to the Ninth Circuit, was made in an "exchange between Representative Charles Carlin and witness Louis D. Brandeis." *Id.*

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S.Ct. 1086, 1089 (1946) (quoting *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836)); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803-04 (1982). Section 16 directly invokes the court's equitable powers.

The Ninth Circuit in *IT&T* relied upon two isolated statements made in committee to ascertain the "intent of Congress." 518 F.2d at 922. This Court has cautioned against relying upon "such isolated fragments of legislative history in divining the intent of Congress." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342-43, 102 S.Ct. 1096, 1102 (1982). It is especially dangerous to rely upon such isolated fragments of legislative history when that history is voluminous. The legislative history of the Clayton Act consists of approximately 3,000 pages of committee reports, hearings, and debate. *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 418 (1st Cir. 1985). Two isolated statements appearing in such a voluminous record can hardly comprise a "clear and valid legislative command." Without such a clear and valid legislative command, the equity power of courts may not be limited.

The First Circuit examined the legislative history of the Clayton Act to determine whether Congress intended that the divestiture remedy be broadly available under Section 16 of the Clayton Act. *Cia. Petrolera*, 754 F.2d at 418-29. In a most comprehensive fashion, the First Circuit examined the committee reports, floor debates, conference committee reports, and committee hearings. *Id.* Based upon its analysis, the court then rejected the Ninth Circuit's holding in the *IT&T* case. *Id.* at 428. The First Circuit found the legislative history as to contrary intent to be inconclusive. *Id.* The court concluded that equity jurisdiction included the power to order divestiture in appropriate cases brought by private plaintiffs. *Id.* at 429. In so holding, the First Circuit considered the plain language of Section 16,[6] the legislative history and goals[7] of the Clayton Act, the powers of a court in

[6]The court compared "the language Congress utilized in granting the government the power to obtain equitable relief, § 15 of the Clayton Act, to that used in § 16." 754 F.2d at 417 (citation omitted). It was "unable to discern from the plain language of these statutes any intended distinction. . . ." *Id.* at 418.

[7]The Court stated: "Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. . . . Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. . . . On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on § 16 "injunctive relief" which would negate the plain language or the sponsors' broad explanations of the provision. Accordingly, we decline to engraft judicially a *per se* limitation on § 16 forbidding an order for divestiture." 754 F.2d at 428-29.

equity, and the effectiveness of the divestiture remedy. *Id.* at 413-30.

B. Divestiture Is The Most Effective Remedy Available To Redress An Anticompetitive Merger.

Without the remedy of divestiture, the states and private plaintiffs are effectively precluded from enforcing Section 7 of the Clayton Act. Frequently, as in the *American Stores* case, it is not feasible for a state or private party to file suit before a merger is consummated. The "symptomatic" remedies permitted by the Ninth Circuit in such cases cannot correct the harm produced by illegal mergers. Divestiture alone protects society against the evil created by an unlawful merger. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128-29, 68 S.Ct. 947, 957 (1948).

This Court has recognized the importance of the divestiture remedy. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-30, 81 S.Ct. 1243, 1251 (1961).

> The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved.
>
> . . . .

> Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of Section 7 has been found.

366 U.S. at 330-31, 81 S.Ct. at 1251-53 (footnotes omitted).

Legal commentators have also recognized the effectiveness of divestiture. *See, e.g.* Kintner, *Federal Antitrust Law* V:40.32 n.963 (1984); P. Areeda, *Antitrust Analysis* 57, n.139 (2d Ed. 1974); Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief*, 19 Pac. L. J. 143, 146 (1987); Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986); Note, *The Use of Divestiture in Private Antitrust Suits*, 43 Geo. Wash. L. Rev. 261, 279-80 (1974); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 Minn. L. Rev. 267, 274-75 (1964). "Because unlawful mergers involve a structural antitrust violation, structural relief, such as divestiture, is often the most appropriate remedy. . . . A successful divestiture provides the greatest assurance that an unlawful merger will not lead to anticompetitive results." 84 Mich. L. Rev. at 1589. When a merger takes place which violates the Clayton Act, it distorts the market; only the divestiture remedy restores competition to its premerger status.

A remedy that is ineffective is really no remedy. The remedial phase of an antitrust case is crucial. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323, 81 S.Ct. 1243, 1249 (1961).

> [T]he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If the decree accomplishes less than that the Government has won a lawsuit and lost a cause."

Id. Accordingly, divestiture, the most important of antitrust remedies, should be obtainable by the states and private parties.

C. Equity Jurisprudence Dictates That The Divestiture Remedy Be Available To Courts In Cases Brought Under Section 16 Of The Clayton Act.

An injunction is an equitable remedy. *Weinberger*, 456 U.S. at 311, 102 S.Ct. at 1803. Equity jurisdiction has a "background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 591-92 (1944). This Court has characterized the fluidity of the court's power in equity:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

321 U.S. at 329-30, 64 S.Ct. at 592.

None of these concepts was new or novel when Congress enacted Section 16 of the Clayton Act and provided for injunctive relief. It was true then as it is today that a court's equitable jurisdiction is not to be limited unless there is a "clear and valid legislative command" of such limitations. *Weinberger*, 456 U.S. at 313, 102 S.Ct. at 1803-04. As discussed in Section II A of this Brief, there is no such legislative command in the instant case. Courts should be allowed, therefore, to grant the relief they find most appropriate under the facts of the cases before them. If this Court decides that the divestiture remedy is available to private parties under Section 16, it is still within the discretion of the district court to grant or deny such relief based upon the "necessities" of the particular case.

D. Public Policy Dictates That The Divestiture Remedy Be Available To Courts Regardless Of Whether The Plaintiff Is The Federal Government Or A Private Plaintiff.

Neither the legislative history of the Clayton Act, the plain words of the statute itself, nor general principles of equity suggest that the divestiture remedy be denied to private plaintiffs or states under Section 16. Indeed, the statutory language, general equitable principles, the goals of the Clayton Act, and public policy considerations mandate that courts be permitted to order the most effective remedy without regard to whether the plaintiff is the federal government, a state government, or a private plaintiff. Divestiture provides the greatest, and frequently the only, assurance that an illegal merger will not lead to an anticompetitive marketplace.

Congress granted private parties rights of action under the Clayton Act, in part, to encourage private parties to assist in enforcing the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 1580 (1969). "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138, 88 S.Ct. 1981, 1984 (1968). The federal government alone cannot adequately enforce the Clayton Act. Its resources are limited. Furthermore, prosecutorial discretion allows the federal government to proceed or not proceed at will as it chooses.

> Where the government fails to enforce certain antitrust laws, private actions can assure that violations of these laws are brought before the courts. In this way, private litigation serves to further the development of the antitrust laws. In creating a private right, Congress necessarily intended private parties to play this vital role. Courts should not allow the government agencies alone to determine, through their enforcement policies, the substance of antitrust law.

Note, *Divestiture as a Remedy in Private Actions Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579, 1595 (1986) (footnotes omitted).

The Ninth Circuit in the instant case seemed to recognize that its decision had a negative effect on the private party cause of action. The court claimed, however, that its holding would not place the states and private plaintiffs in "an untenable position," since

suit could be filed before a stock sale has been completed. 872 F.2d 846. By so stating, the Ninth Circuit ignores public policy and economic reality, and most importantly, sends a dangerous message to the business community.

In *Cia. Petrolera Caribe, Inc.*, the First Circuit addressed the danger inherent in such a distinction:

> [I]t is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated.

754 F.2d at 430.

Furthermore, states and private plaintiffs do not always have access to the information necessary to analyze mergers before the transactions are completed. For example, state attorneys general are not permitted access to Hart-Scott-Rodino filings directly from the federal government. *Lieberman v. FTC*, 771 F.2d 32, 37-38 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985).[8]

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[8]Although many states have the power under their statutory law to obtain documents from the merging parties, *see, e.g.*, Tex. Bus. & Com. Code §15.10, such pre-complaint discovery power is often too slow in the fast-paced world of merger activity. Private parties other than states do not have such subpoena power.

Even if essential information is available, the analysis required to determine whether a merger should be challenged is often too complicated to be accomplished within the narrow "window of opportunity" established by the Ninth Circuit in *American Stores*. As a matter of public policy, antitrust law should not require suit before the time when filing is "responsibly possible." Indeed, the Ninth Circuit's holding may often unfairly force private plaintiffs to weigh the threat of sanctions against the loss of their only effective remedy, divestiture. *See* Fed. R. Civ. P. 11. Moreover, the decision forces private and state plaintiffs to act prior to completion of any federal review process. Cooperation between state and federal law enforcement authorities should be encouraged by the courts, not discouraged.

The facts in the instant case demonstrate the difficulties created by the Ninth Circuit's decision. The district court found that California had "conducted this investigation as swiftly as was responsibly possible." *American Stores*, 697 F.Supp. 1125, 1135 (C.D. Cal. 1988), *rev'd*, 872 F.2d 837 (9th Cir.), *cert. granted*, 110 S.Ct. 275 (U.S. October 16, 1989) (No. 89-258). The district court also found that California was participating in the "premerger" review procedure established by the Hart-Scott-Rodino Act. 697 F.Supp. at 1135. California submitted comments to the FTC analyzing the merger and recommending that the FTC withdraw its proposed consent agreement. *Id.* The district court found that it was not "unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval." *Id.*

The record reveals that the FTC approved the merger in the instant case on August 31, 1988, and California filed suit the next day. *Id.* To accept the Ninth Circuit's assertion that "California could have

sued several months earlier and attempted to enjoin the merger," 872 F.2d at 846, one must acknowledge that California would have had to do so without regard for the FTC review. By participating in the FTC review, California was attempting to protect competition for its citizens, while also cooperating with the federal government. The Ninth Circuit's decision requires such future cooperation to be exercised by states at the risk of losing the most effective remedy, divestiture.

III. THE DIVESTITURE REMEDY SHOULD BE AVAILABLE TO STATES, SUCH AS CALIFORNIA, WHICH REPRESENT PUBLIC RATHER THAN PRIVATE INTERESTS.

If this Court decides that the divestiture remedy should not be available to parties with a purely private interest to vindicate, the Amici States respectfully contend that the remedy should nonetheless be granted to states, such as California, which represent public rather than private interests. If a distinction is to be drawn between private and public plaintiffs, states should be considered public parties.

California brought the instant lawsuit as *parens patriae* on behalf of its citizens. This Court has long recognized the states' standing to bring such suits for injunctive relief under federal antitrust laws. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447-49, 65 S.Ct. 716, 721-22 (1945). In so doing, the Court has drawn a significant distinction between the proprietary interest of states or private citizens and the public interest of states.[9] *Id.*; *Kansas v. Colorado*, 206 U.S. 46, 98-99, 27

[9] "Here Georgia asserts rights based on the anti-trust laws. . . . As we have seen Georgia sues as a proprietor to redress wrongs suffered by it as the owner of various public institutions. . .

(Footnote continued on next page)

S.Ct. 655, 668 (1907). This public interest distinction should be equally applicable to remedies.

In the instant case, the Ninth Circuit denied California's request for divestiture because the court found that Congress had not intended divestiture as one of the equitable remedies available under Section 16. Assuming, *arguendo*, that Congress intended to narrow the courts' equitable power in such a manner, any such distinction would be drawn because private citizens act in a strictly proprietary capacity. The statement of Congressman John Floyd indicates that any intent expressed by a member of Congress during the consideration of the Clayton Act was directed at private individuals and not at governments: "We did not intend by Section [16] to give the *individual* the same power to bring a suit to dissolve the corporation that the Government has. . . ." 518 F.2d at 922 (emphasis added). States, which are "government" in the same sense the Department of Justice and Federal Trade Commission are, should be considered "public" parties when acting in their *parens patriae* capacity. Accordingly, all equitable remedies available to the federal government, including divestiture, should be available to the states.

CONCLUSION AND PRAYER

For the foregoing reasons, the Amici States respectfully request that the decision of the Ninth Circuit in the instant case be reversed.

(Footnote continued from previous page)
But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia." *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 447, 65 S.Ct. at 721.

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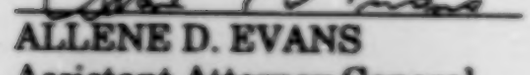

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NO. 89-258

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Appellant,

VS.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORPORATION, INC., and LUCKY STORES, INC.,
Appellees,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW IN SUPPORT OF APPELLANT STATE OF CALIFORNIA

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NO. 89-258

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October Term, 1989

THE STATE OF CALIFORNIA,
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JOHN K. VAN DE KAMP,
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VS.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORPORATION, INC., and LUCKY STORES, INC.,
Appellees,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

On October 16, 1989, this Honorable Court granted certiorari to hear the above entitled case. The Center for Public Interest Law of the University of San Diego School of Law ("Center for Public Interest Law"), as *amicus curiae*, respectfully urges this Court to grant the relief sought by the State of California and not to limit the antitrust remedies available to the courts to correct anticompetitive practices.

INTEREST OF THE CENTER FOR PUBLIC INTEREST LAW

The Center for Public Interest Law is a non-profit, academic public interest law center specializing in antitrust and regulatory issues. It is vitally interested in ensuring effective enforcement of state and federal antitrust laws. One of the primary missions of the Center for Public Interest Law is to promote effective enforcement of the antitrust laws, especially the remedial provisions of Section 16 of the Clayton Act so that all the citizens of this nation may enjoy the benefits Congress intended by protecting competitive markets.

The Center for Public Interest Law supports

California's contention that divestiture, like other equitable remedies, should be available to private plaintiffs, as well as the courts, in cases brought under Section 16 of the Clayton Act. The Ninth Circuit's contrary holding in *California v. American Stores*, 872 F.2d 837 (9th Cir.1989) is unwarranted by any policies underlying the antitrust laws and poses a serious threat to effective antitrust enforcement.

ARGUMENT

The Ninth Circuit's decision in this case imposes a categorical bar, under Section 16, to the use of the divestiture remedy which this Court has long recognized provides the most effective relief against unlawful mergers. (*United States v. E.I. Du Pont de Nemours & Co.*, 336 U.S. 316, 331, 81 S.Ct. 1243, 1252 (1961).) In effect, the Ninth Circuit, without the benefit of new statutory law, has developed a *per se* laches bar

to all private actions seeking to remedy the harm threatened by complete mergers. While the doctrine of laches has a long history as an equitable defense, (*Standard Oil Company of California v. United States*, 685 F.2d 1322 (U.S.C.C. 1982); *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Department of Energy*, 683 F.2d 1171 (8th Cir. 1982); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800 (8th Cir. 1979), it is a defense uniquely suited to the nice adjustments which are correctly made under varying factual situations. Trial courts are equipped to make these individualized decisions. The Ninth Circuit's decision here turns these principles on their head. The very fact that the Ninth Circuit's "no-divestiture" rule precludes district courts from weighing factors such as the diligence of the plaintiff, the presence or lack of prejudice to the merging parties and, most importantly,

the threat of injury and availability of alternative, effective relief, suggests the inappropriateness of a *per se* and categorical bar based on the laches related rationale here posited by the Ninth Circuit.

California was well-justified in awaiting final action by the FTC following its review of the materials provided under the Hart-Scott-Rodino Antitrust Improvements Act before initiating this action. (15 U.S.C. 18a.) Indeed, the Ninth Circuit opinion simply ignores the District Court's finding that California should have initiated this suit before the FTC reached even a tentative conclusion that the acquisition of Lucky by American Stores was unlawful, but could be remedied by the consent agreement its staff proposed. (872 F.2d at 846.) It is difficult to conceive of a ruling which suggests a greater waste of scarce judicial resources than one which compels private parties to ignore the H-S-R review

procedures and rush to court for fear of losing the possibility of effective relief.

Two additional factors render a categorical laches defense regrettable. First, an unjustified merger is not simply a matter of retroactive loss. An unlawful merger which cannot be unwound will create continuing prospective damage to consumers. It increases concentration, raises prices, limits consumer choice and affects the fluidity of entry and economic opportunity. (*Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Von's Grocery Company*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).)

Second, a public policy that no merger may be unwound provides a strong incentive to spring them secretly and quickly. Where the only relief may be prospective, it is to be expected that merger tactics will

evolve to make prospective remedies ineffective remedies.

Finally, the Center for Public Interest Law would point out the plain wording of Section 16 of the Clayton Act, "Any person . . . shall be entitled to . . . have injunctive relief under the same conditions and principles as . . . granted by the courts of equity . . ." The Ninth Circuit has carved out divestiture as a separate species of injunctive relief, so distinct from other remedies that purportedly it should be excepted from the plain language of the statute. The significance of this exception is not limited to just mergers law. It is likely that in other substantive areas of antitrust law, such as monopolization under the Sherman Act, the "no-divestiture rule" of the Ninth Circuit will preclude the only effective relief in cases brought under Section 16.

In fact, as the range of cases interpreting

Section 16 shows, divestiture is but one form of injunctive relief on a broad continuum of ameliorating options open to district courts. This range extends from forced sale of assets and compulsory licensing of intellectual property to import bans and mandating the provision of goods and services to all comers. (*cf. Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219, 1221 (D.C. Cal. 1973); *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 726 (3d Cir. 1962).) Are these injunctive remedies also to be written out of Section 16 of the Clayton Act?

As this Court has indicated, the grant of injunctive remedies to private parties "serves the high purpose of enforcing the antitrust laws . . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of

nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" (*Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130-131 (1969).) All forms of injunctive relief disrupt an offending firm's post-violation operations--that is the purpose of injunctive relief. Whether such disruptions are justified should hinge on the efficacy of the particular remedy to redress the perceived harm, not on arbitrary limitations on the availability of options. If a court cannot right a wrong flowing from a violation of the antitrust laws, how is the grant of equitable powers to the courts of any practical use?

Congress intended the courts to be the arbiters of the behavior which violates the substantive provisions of the antitrust laws. That role should not be delegated solely to the FTC or the Department of

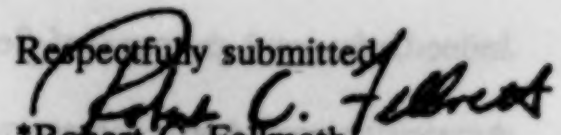
Justice. The Ninth Circuit's decision in this case makes the courts hostage to the relief decisions made by the FTC without the benefit of public hearing or judicial review. Our basic competition statutes are too precious to hand the keys to effective relief to a single keeper. Indeed, the very purpose of Section 16 of the Clayton Act was to ensure that the courts remain open to private parties to serve the high purpose of enforcing the substantive provisions of our national economic charter where the federal government is unable to do so. It would be ironic if the vehicle chosen by the Congress to accomplish that purpose precludes private parties from securing the most effective relief available to prevent the harm which flows naturally from mergers which violate Section 7 of the Clayton Act.

CONCLUSION

For the foregoing reasons, the Center for Public Interest Law respectfully asks this Court to reverse the judgment of the Ninth Circuit.

Dated: November 22, 1989

Respectfully submitted,



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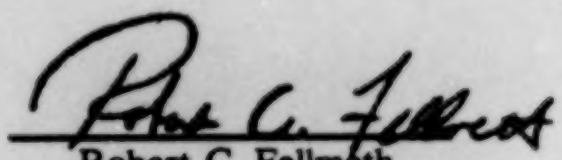

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No. 89-258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

v.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,

Respondents.

BRIEF OF THE CALIFORNIA RETAILERS ASSOCIATION AND THE CALIFORNIA MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether private plaintiffs—including state attorneys general—can obtain divestiture under Section 16 of the Clayton Act, 15 U.S.C. § 26, for alleged violations of Section 7 of the Clayton Act, 15 U.S.C. § 18, after the federal government has itself evaluated the challenged merger or acquisition and has entered into a consent agreement requiring structural relief that includes, *inter alia*, divestiture.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-258

STATE OF CALIFORNIA,

Petitioner,

v.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,

Respondents.

BRIEF OF THE CALIFORNIA RETAILERS ASSOCIATION AND THE CALIFORNIA MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The California Retailers Association is a voluntary trade association for major California retailers. Its approximately 80 members, operating over 4,000 stores throughout California, include most major California department stores, supermarkets and chain drug stores, as well as some smaller specialty stores. The California Manufacturers Association is a voluntary non-profit membership organization representing approximately 800 manufacturing and processing companies headquartered or doing a substantial amount of business in California. Current membership

represents approximately 70 percent of California's industrial work force, and company sizes range from the smallest business to the largest multinational corporations in the world.

As a consequence of heightened federal scrutiny of corporate mergers, acquisitions and related transactions, the United States Government, through the Department of Justice and Federal Trade Commission, has become a regular participant in major corporate transactions involving amici's members. Such transactions increasingly are structured to accommodate the interpretation by these agencies of federal antitrust law and policy. Petitioner's argument in this proceeding threatens a serious disruption of federal efforts to promote uniform and consistent antitrust policy *vis à vis* such transactions, and subjects businesses, as well as investors and employees, to intolerable uncertainty when engaging in commercial activity. Because they are vitally interested in effective and uniform enforcement of the federal antitrust laws, amici file this brief in support of the Ninth Circuit's decision below.[1]

SUMMARY OF ARGUMENT

The Federal Trade Commission ("FTC"), operating pursuant to its authority under the Hart-Scott-Rodino Act[2] and pursuant to the FTC's consent decree au-

[1] Pursuant to Rule 36.2 of the Rules of this Court, this brief is filed with the consent of petitioner and respondents. Letters of consent from both parties are being filed concurrently herewith.

[2] Antitrust Improvements Act of 1976, Pub. L. 94-435, 15 U.S.C § 18a, *et seq.*

thority,[3] negotiated a decree whereby American Stores Co. ("American") was permitted to acquire Lucky Stores, Inc. ("Lucky") provided that American divested certain assets, including numerous supermarkets throughout California. Simultaneous with the FTC investigation and negotiations, the California Attorney General's office ("California") conducted its own investigation of the transaction, participated in the federal consent decree procedure, and objected to the proposed decree. When its suggestions regarding the scope of the proposed decree were not incorporated into the FTC's decree, and after the decree became final, California filed a Clayton Act suit in federal district court seeking a far more extensive divestiture. By persuading the district court to accept different market definitions and different operating assumptions than those applied by the federal agency specifically charged with protecting the public interest nationally, California has taken a major step towards undoing the careful work of that agency.

This case demonstrates precisely why seriatim and potentially conflicting divestiture remedies are not available to private parties under Section 16 of the Clayton Act, 15 U.S.C. § 26. If accepted, California's construction of Section 16 would enable all antitrust plaintiffs—including competitors, suppliers, customers, consumer groups and states, commonwealths and territories—to await the closing of a transaction that has been reviewed and approved by federal antitrust enforcement agencies and then to seek further structural relief that is inconsistent or incompatible with the federally approved transaction. This result would

[3] *See* 16 C.F.R. §§ 2.31-.34, 3.25 (1989).

introduce intolerable uncertainty into commercial transactions, into the investment community and into the labor force.

Such uncertainty inevitably will erode the effectiveness of coordinated federal antitrust enforcement efforts in several ways. The relief sought in this case will thwart the carefully structured pretransaction review process created by Congress in the Hart-Scott-Rodino Act by nullifying federal enforcement decisions which are based on such pretransaction review, and by eliminating all incentives for businesses to work with federal antitrust enforcement authorities to resolve competitive concerns in advance of the closing of transactions.

Similarly, the purposes of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), and analogous FTC procedures for negotiating and entering into antitrust consent decrees are defeated if private parties can seek to unwind a divestiture decree or other consent agreement upon which the federal government has placed its imprimatur. Where, as in this case, assets have already been sold to third parties pursuant to a divestiture agreement with the FTC, it is both unreasonable and inequitable to allow further restructuring at the behest of private parties relying on inconsistent arguments and theories. As a practical matter, the business community will simply stop negotiating consent agreements with federal antitrust enforcers because such agreements will assure them of nothing but the elimination of but one of many equally empowered potential "divestors" seeking more extensive, or inconsistent, structural relief.

California's argument that federal enforcement agencies cannot keep pace with merger activity and

that private divestiture is necessary to "plug gaps" in government enforcement, Pet. Br. at 30-35, is wholly without force, particularly in this case. California seeks divestiture *not* because the federal agencies were too overworked to evaluate the merger, but because California wants to substitute its judgment for the judgment of federal authorities as to how to restructure an industry under the federal antitrust laws. California's action, and similar actions by states, local governments, competitors or consumer groups manifestly will not enable the federal agencies to exercise their enforcement discretion more effectively or efficiently. To the contrary, it will undermine the detailed regime of federal enforcement by enabling such diverse and privately motivated parties to undo months and perhaps years of federal enforcement activities.[4]

ARGUMENT

The principal responsibility for enforcement of the federal antitrust laws resides in the federal government. *See United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Specifically, the Antitrust Division of the Department of Justice, and the Federal Trade Commission, have been given this enforcement role. 15 U.S.C. §§ 4, 15, 21, 45. In addition, Congress has

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[4] Contrary to petitioner's suggestion, this case does not threaten the ability of private plaintiffs to secure relief for federal antitrust violations. Neither respondents nor amici contend that private plaintiffs cannot seek appropriate relief to block threatened anticompetitive conduct or recover treble damages flowing from antitrust injuries. In private hands, those traditional antitrust remedies promote the goals of the federal antitrust laws. The relief sought in this case undermines those goals.

enacted provisions that enable private parties to seek some forms of federal antitrust relief in appropriate circumstances. 15 U.S.C. §§ 13, 18. As California has acknowledged, the principal purpose of creating these private rights of action was to "create a comprehensive enforcement scheme relying on *complementary* efforts of the government and its citizens," Pet. Br. at 25 (emphasis added) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969)), and to "fill gaps in the federal antitrust enforcement effort." *Id.* (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979)).

California's divestiture lawsuit seeks neither to "fill gaps" in, nor to "complement" the enforcement efforts of, the federal government. Rather, it seeks relief that directly conflicts with the federal antitrust enforcement scheme by attempting to undo a carefully crafted enforcement determination by the FTC that approved American's acquisition of Lucky subject to substantial divestiture provisions and other structural relief.

A. The Remedy Sought By California Would Undermine The Federal Antitrust Enforcement Scheme

1. The Desired Relief Would Thwart the Pretransaction Procedures of the Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a, *et seq.*, establishes, *inter alia*, "an elaborate process requiring those who attempt acquisitions above a specified size to notify the [Federal Trade] Commission and the Antitrust Division of their intentions, tc furnish information requested by the agencies, and to wait a period of time before consummating the transactions,

allowing the agencies to analyze the data." *Lieberman v. Federal Trade Commission*, 771 F.2d 32, 35 (2d Cir. 1985).

The overriding purpose of the HSR Act is to eliminate the need to invoke the remedy of divestiture. The Act "strengthen[s] the enforcement of Section 7 [of the Clayton Act] by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2637. The statute's notification and waiting provisions afford the federal government "a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act." *Id.* The HSR Act thus "reflects a congressional judgment that divestiture and other post-acquisition remedies were difficult, expensive and sometimes futile." *Mattox v. Federal Trade Commission*, 752 F.2d 116, 119 (5th Cir. 1985).

In particular, the HSR Act was enacted to "ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . ," H.R. Rep. No. 1373, *supra*, at 11, and to "advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." *Id.* While the HSR review process does not immunize the merging firms from private antitrust

liability, 15 U.S.C. § 18a(i)(1), permitting private divestiture proceedings by competitors or others seeking to undo decrees negotiated with, or transactions reviewed and approved by the Antitrust Division or the FTC, presents a square conflict with the HSR Act and its important goals. *Cf.* Amicus Curiae Brief on Petition for Certiorari of the United States, at 9 n.9, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473).

This point has been addressed by courts of appeals in a slightly different context. Premerger notification materials submitted pursuant to the HSR Act must contain relevant information that is necessary to enable the FTC and the Justice Department to determine whether a proposed acquisition would violate the federal antitrust laws if consummated. 15 U.S.C. § 18a(d). These materials may not be "made public." 15 U.S.C. § 18a(h). In *Mattox*, *supra*, the Fifth Circuit held that this provision precluded disclosure of HSR materials to state attorneys general because, *inter alia*, such disclosure might serve as "a disincentive to prompt and complete compliance with the premerger notification procedures by potential merger partners." 752 F.2d, at 122. Moreover,

> [b]ecause HSR only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality. This case would be an example of such a problem: here, Texas seeks premerger materials with an eye toward a possible attack on a merger that the FTC has already tentatively approved.

Id.

Similarly, in *Lieberman*, *supra*, the Second Circuit rejected the Connecticut Attorney General's argument that he was entitled to review HSR disclosure materials in part because the Act was intended to facilitate prompt *premerger* relief and thereby the need to avoid divestiture. The court observed, "[w]e doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance." *Lieberman*, 771 F.2d, at 40.[5]

This case illustrates the reasons for the concerns of the courts of appeals in *Mattox* and *Lieberman*.

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[5] Although the HSR Act did not eliminate a private plaintiff's Section 16 right to obtain pretransaction injunctive relief, the legislative history of the HSR Act fully supports the Second Circuit's analysis in *Lieberman* when viewed in the context of divestiture. As Representative Rodino explained in discussing why the Conference Committee omitted reference to injunctive relief in describing the parens patriae authority granted to state attorneys general in the new legislation:

> The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. Provision for [broader] equitable relief; that is, *decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10,295-96 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino) (emphasis added).

American voluntarily produced to California its entire HSR submission prior to the filing of the FTC's complaint and publication of the settlement order. Based on those HSR materials and its own investigation, California participated in the notice and comment proceedings relating to the proposed FTC consent decree. Rather than seeking a preliminary injunction to maintain the *status quo* before respondents were "irreversibly scrambled together," California waited until the consent agreement had been entered as an FTC order and then, because it disagreed with the FTC's application of the federal antitrust laws to the transaction, filed suit in federal court seeking to undo the FTC's carefully crafted divestiture decree and pursuing inconsistent relief. In short, California used the HSR disclosure, which is designed to *eliminate* the need for divestiture, to "attack . . . a merger that the FTC had already . . . approved" and to seek divestiture. *See Mattox*, 752 F.2d, at 122. This practice—and the private divestiture remedy that would permit it—cannot be reconciled with the purposes of the HSR Act.

2. Seriatim Divestiture Proceedings of the Type Advocated by California Would Defeat Judicial and Regulatory Consent Decree Mechanisms

Like the HSR Act, the consent judgment provisions of the APPA, 15 U.S.C. § 16(b)-(h), are aimed at achieving prompt and efficient resolutions of federal antitrust disputes. "The APPA was adopted in the wake of concerns that government consent decrees had been entered in secrecy and without adequate attention to the public interest." *United States v. LTV Corp.*, 746 F.2d 51, 52 n.2 (D.C. Cir. 1984). The statute established comprehensive procedures for the settlement of civil antitrust actions brought by the government. The FTC has adopted parallel regulations governing settlement of administrative complaints filed by the Commission. 16 C.F.R. §§ 2.31-.34, 3.25.

The APPA requires that "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws," be filed in the district court in which the action is pending and published in the Federal Register at least sixty (60) days prior to the effective date of the judgment. 15 U.S.C. § 16(b). During this 60-day period, the United States must "receive and consider" written public comments on the proposed consent judgment. 15 U.S.C. § 16(d).

In order to ensure that the public has sufficient information upon which to base such comments, the APPA further mandates that the United States make publicly available the proposal and supporting materials and information, and that it file with the district court and publish in the Federal Register a "competitive impact statement" detailing the nature of the proceeding, the alleged antitrust violation, an explanation of the proposal, the remedies available to private plaintiffs, the procedures available for modification of the proposal, and a description of alternatives to the proposal actually considered by the United States. 15 U.S.C. § 16(b)(1)-(6).[6] Any public comments and the federal government's responses

[6] Summaries of all of the information published in the Federal Register also must be published in certain newspapers of general circulation for certain periods of time. 15 U.S.C. § 16(c).

thereto also must be published in the Federal Register. 15 U.S.C. § 16(b) & (d).

Before entering a consent judgment, the district court must "determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e). In making the public interest determination, the court has broad authority to take testimony and gather evidence. In addition, the district court can authorize "full or limited participation in proceedings before the court by interested persons or agencies," such as third-party intervention or the filing of amicus curiae briefs. 15 U.S.C. § 16(f)(3). Although it has been held that persons who participate but do not formally intervene are not entitled to appeal from consent judgments,[7] *any* participant may move to take testimony of government officials or expert witnesses, 15 U.S.C. § 16(f)(1), and *any* interested person may be permitted to examine such witnesses. 15 U.S.C. § 16(f)(3). The district court is instructed to consider the effect on the "public generally and individuals alleging specific injuries," as well as the public comments and responses elicited by the procedures discussed above, in deciding whether the consent judgment is in the "public interest." 15 U.S.C. §§ 16(e), 16(f).

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[7] *See, e.g., United States v. LTV Corp.*, 746 F.2d 51, 53-54 (D.C. Cir. 1984). Upon demonstrating that the United States is not adequately representing the "public interest," a private party may be entitled to intervene in a government antitrust action. *Id.*, at 54 & n.7, *and cases cited*. Moreover, "[o]bjectors to consent judgment may seek to intervene in the proceedings for the limited purpose of appeal." *Id.*, n.7 (citing, *inter alia*, *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*summary affirmance*)).

The FTC's regulations governing consent settlement agreements in proceedings brought by that agency establish a similar procedure. *See* 16 C.F.R. § 2.31-.34, 3.25. Those regulations require the Commission to publish in the Federal Register a consent agreement it has initially accepted, along with the accompanying order and explanation of the provisions of the order. The Commission also must make available to the public any other information that will enable interested persons to evaluate the terms of the order. For a period of sixty (60) days after publication, the Commission must receive and consider public comments and then decide, based upon such comments, whether to withdraw its acceptance of the agreement. 16 C.F.R. § 3.25.

The APPA, and the parallel FTC regulations, provide a comprehensive mechanism for settling with finality government antitrust suits. The private divestiture remedy that California claims will serve as a "complementary" component to enforcement of the federal antitrust laws would in fact allow private plaintiffs to ask federal courts to veto court-approved or, as in this case, agency-approved, consent agreements deemed by the enforcement authorities to be in the public interest.[8]

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[8] Permitting non-parties that failed successfully to intervene in FTC proceedings, 16 C.F.R. § 3.14, to bring a direct judicial challenge, by way of appeal, to the FTC's determination that a consent decree is in the public interest may improperly encroach upon the broad enforcement discretion of the agency. *See Action on Safety and Health v. Federal Trade Commission*, 498 F.2d 757, 762 (D.C. Cir. 1974). *Cf. United States v. LTV Corp., supra*, 746 F.2d, at 55 ("given that an important purpose of the [APPA] was to preserve the consent judgment as a method of resolving

At a more fundamental level, the remedy that California seeks will emasculate the detailed HSR and APPA procedures enacted by Congress by rendering the business community unwilling to negotiate pre-transaction or post-transaction settlements with federal antitrust authorities. As a practical matter, the continued threat of further lawsuits seeking structural relief will either eliminate settlement discussion or will require a much larger table, with enough chairs to accommodate fifty state attorneys general, an undetermined number of consumer and public interest groups, all potential competitors and, if a hostile takeover is involved, the target.

Moreover, such open-ended settlement discussions would be exercises in futility, since each group represented can be expected to pursue its own agenda. Thus, while the federal government will urge a resolution it deems consistent with federal antitrust and public policy, each other group will presumably advocate its own competing and conflicting goals, all in the name of the federal antitrust laws. *See* n.14, *infra*. The risk that a settlement with the federal government will represent simply a first step in the gradual carving up of a corporate transaction will either chill efficiency-producing transactions or will persuade business to forego settlement in favor of a full trial on the merits. This result is wholly at odds

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government antitrust cases, it would be anomalous to conclude that Congress intended to permit persons who had not even attempted to intervene in the proceedings to appeal, and thereby disrupt, the entry of a final consent judgment") (footnote omitted). California's attempt to obtain conflicting structural relief in this case is equally intrusive of the Commission's enforcement determinations.

with Congress's desire to "ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . [and to] advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373, *supra*, at 11.

Neither the premerger injunction remedy nor the postmerger damage remedy that are available to private antitrust plaintiffs operate to undermine these carefully crafted HSR and APPA procedures. *Cf.* Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 167 n.93 (1983) ("A consent decree bars private parties from suing for injunctive relief, but does not bar private treble damage suits. Thus competitors will be bound to the structural relief approved in the decree . . ."). [9] Private divesti-

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[9] Decrees that determine the status of an entity are "proceedings *in rem* . . . . " *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934). Like proceedings under the federal bankruptcy laws, which are "*in rem* and . . . binding on, and *res judicata* as to, all the world, only in respect of the status of the bankrupt," *Myer v. International Trust Co.*, 263 U.S. 64, 73 (1923), divestiture should be viewed as a single proceeding in which all claims for structural relief under the federal antitrust laws must be resolved. *See also Gratiot County State Bank v. Johnson*, 249 U.S. 246 (1919); *Farrell v. O'Brien*, 199 U.S. 89 (1905); Restatement (Second) of Judgments § 31 (1982). *Cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986). Such a rule would serve the " 'public interest . . . that the result attained should be firm and perpetual,' " *Farrell*, *supra*, 199 U.S., at 103 (*quoting Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874)), and ensure that the integrity of divestiture decrees obtained by the federal government are not needlessly and waste-

ture, on the other hand, would render these congressionally created procedures a nullity. The effect of a private divestiture suit, if successful, is uniquely disruptive of the consent judgment component of the federal scheme: it necessarily defeats the terms of government settlement agreements.

B. The Relief Sought By California In This Case Would Subvert The Goals Of The Federal Antitrust Laws

1. The Relief Sought by California Will Empower a Diverse and Unlimited Collection of Individuals to Effect Industry-Wide Change Because of Localized, Specific or Limited Economic Factors Rather Than General Public Policy Considerations

The remedy of divestiture is uniquely public in its purpose and effect. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("[d]ivestiture is itself an equitable remedy designed to protect the public interest"). While a divestiture decree is intended to and does have an effect on an entire economic market (or perhaps several markets), it is by no means clear that the illegal conduct divestiture is invoked to redress in any given case will

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fully relitigated. *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971) (principles of res judicata are intended to achieve fairness, judicial economy and efficient allocation of resources).

The binding nature of a divestiture decree would be limited to that remedy—it would not preclude litigation of issues of liability or damages in private actions brought by non-parties. *See Myer, supra*, 263 U.S., at 73. Thus, precluding private collateral challenges to federal divestiture decrees would strike an appropriate balance between the interests of fairness, finality, and efficiency on the one hand, and the interests of persons in seeking redress for antitrust injuries on the other.

have an equivalent effect on all members of that market or those markets. Consequently, a private divestiture remedy creates a serious risk of skewing competitive conditions in an entire market, as well as impairing the rights of nonculpable third parties, such as stockholders and employees of the divested company. *See* Van Cise, *Limitations Upon Divestiture*, 19 Geo. Wash. L. Rev. 147 (1950). Although competitive conditions in a marketplace may support a divestiture order, social, political or broader economic issues may counsel strongly against divestiture.

This Court recognized this precise point in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), where it cautioned that

> [i]n considering [antitrust remedies] . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the [antitrust laws]; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which . . . inspired and dominated the combination from the beginning.

221 U.S., at 185. Similarly, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), this Court admon-

ished that while "injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest,. . . *one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.*" 221 U.S., at 78 (emphasis added).

Unlike federal enforcement authorities whose duty it is to make broad public policy judgments, a private antitrust plaintiff cannot be expected to factor these considerations into the decision whether to pursue a divestiture remedy. "To entrust the vindication of [a] public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress." *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 295, 306 (1940) (Frankfurter, J., joined by Roberts, Black, Douglas and Murphy, JJ.). *See also Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 53, 649-50 (1914) (statement of Louis Brandeis).

Furthermore, "to allow any private interest to thresh out the complicated questions" that arise in determining the propriety of divestiture "is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues." *L. Singer & Sons*, 311 U.S., at 307. *See also Schrader v. National Screen Service Corp.*, 1955 Trade Cas. (CCH) ¶ 68,217, 71,009 (E.D. Pa. 1955), *rev'd on other grounds*, 238 F.2d 59 (3d Cir. 1956), *vacated on other grounds*, 352 U.S. 992 (1957) ("it has come to be generally recognized that considerations of policy are against decreeing divestiture or the complete destruction of a nationwide business at the suit of an

individual in a private action under the antitrust laws, particular [*sic*] where that would have a far-reaching and possibly adverse effect upon interests not proved to have participated"). As recently stated by the head of the Antitrust Division of the United States Department of Justice, "[a]ntitrust traditionally has been an arm of national economic policy, designed to enhance the workings of the market system .... It would be paradoxical to allow the central theme of this policy to be set by private litigants or office holders in the more than 50 states, territories, commonwealths, and possessions." Rill, *Antitrust: Where We Stand Today*, 57 Antitrust L.J. 6-7 (1988).[10]

It is no answer to suggest that the solution to this problem lies with the courts to prevent overaggressive utilization of the divestiture remedy.[11] Such a solution places the antitrust courts in an untenable position by requiring them to make broad public policy de-

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[10] *See also*, ABA Antitrust Section, Monograph No. 16, *Private Litigation Under Section 7 of the Clayton Act: Law and Policy*, 81 (1989) (emphasis added):

> Antitrust analysis of mergers typically involves an exercise of great factual complexity. Usually, the "structure, history and probable future" of a market must be examined in detail. The difficulty of this exercise is compounded by the unsettled nature of the evaluative criteria that may be applied. *The addition to the equation of an improperly motivated plaintiff whose theories and evidence will not be directed to elucidating the statutory inquiry increases significantly the likelihood of . . . error, but the error will be hidden in the inherent complexity and deliberate confusion.*

[11] *See* Comment, *Section 16 of The Clayton Act: Divestiture An Intended Type of Injunctive Relief*, 19 Pac. L.J. 143, 165 (1987).

terminations concerning the propriety of divestiture based solely on evidence furnished by self-interested private parties. This approach

> also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts.

L. Singer & Sons, 311 U.S., at 307.[12] The already overburdened federal courts cannot properly be asked to conduct supplemental evidentiary hearings to determine whether a proposed divestiture remedy unacceptably burdens some broader societal interests, or whether one divestiture remedy is better than another already ordered. These broader policy concerns can only properly be addressed *ex ante* by the enforcement authorities within the United States Government whose functions include making such

[12] In enacting the APPA, 15 U.S.C § 16, Congress specifically commanded the federal courts to consider the public policy ramifications of antitrust consent decrees entered into between the federal government and private parties. 15 U.S.C. § 16(e). The legislative history of this Act demonstrates severe resistance on the part of Congress to delegating this public policy function to the courts. *See generally* Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 167 n.97 (1983). This history demonstrates compellingly that placing the federal courts in the role of public policy maker is not something the Congress does lightly, and is not something that Congress can be assumed to have intended absent explicit statutory language to that effect.

determinations. Neither private parties—who lack the incentive—nor the courts—who lack the resources—can be expected effectively to screen unwarranted divestiture proceedings.

The need for such prelitigation diligence is particularly acute in the divestiture context. As noted by Professors Areeda and Turner, "[w]hen a substantive rule is deemed truly wise only if applied to 'significant' instances, the government plaintiff is more likely than the private plaintiff to withhold suit in lesser instances." 2 P. Areeda & J. Turner, *Antitrust Law* § 312a, at 37 (1978). Accordingly, "[s]ome possibly far-reaching rules of antitrust liability make sense and are administerable in practice only when there is a *responsible filtering* of (1) the cases presented to the court or (2) the company and industry reorganizations proposed." *Id.*, at 36 (emphasis added).

California argues that the "injunctive relief" language of Section 16 should be interpreted broadly to afford the fullest measure of equitable power, including the power to decree divestiture upon the request of a private party, because, *inter alia*, " 'the public interest is involved in a proceeding of this nature . . . .' " Pet. Br., at 13 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)). However, a private plaintiff is likely to seek divestiture without regard to the public interest, "looking only to his own interest." *United States v. Borden Co.*, 347 U.S. 514, 519 (1954).[13]

[13] *See also*, ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act, Policy and Law*, App. A, at 78 (1977) ("Private competitors who bring a lawsuit to vindicate their own

Indeed, " 'the scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these.' " *Borden*, 347 U.S., at 518-19 (citation omitted). While "[t]he Government seeks its injunctive remedies on behalf of the general public . . .[,] the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served." *Id.*, at 518.

Nor is it relevant that the challenger in this case is the State of California purporting to bring suit as parens patriae on behalf of its citizens. *See* Pet. Br., at 26 n.5. While California's motives in seeking further divestiture are presumably beyond reproach, its efforts to undo the decree negotiated by the FTC demonstrate a perception of federal antitrust policy that is at odds with the policy views of the federal antitrust enforcement agencies.[14] Although California

private interests are not primarily motivated by the public interest").

[14] The federal antitrust laws embody a variety of economic and social theories and approaches that frequently conflict with one another. As Professors Areeda & Turner explain:

> In passing the antitrust laws "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." Yet this simple formulation is not self-defining, and conceals a diversity of possible objectives that are substantially consistent but yet sometimes inconsistent in critical respects.
>
> The economic objective of a pro-competitive policy is to maximize consumer economic welfare through efficiency in the use and allocation of scarce resources, and via progressiveness in the development of new productive techniques and new products that put those resources to better use. At the same time, competitive policy also promotes "populist" goals that are commonly thought important. It disperses wealth; limits business size; broadens entrepreneurial opportunities; and substitutes the impersonal forces of the market place for the economic power of private individuals or groups to exploit or coerce those with whom they deal.
>
> Economic and populist objectives may diverge when efficiencies dictate displacement of small firms by larger business units.

1 P. Areeda & D. Turner, *Antitrust Law* § 103, at 7-8 (1978) (footnote omitted).

may be acting on behalf of some members of the public, it is necessarily motivated by a narrower or more localized reading of the public interest than are federal authorities. There is simply no guarantee that a private party *or* a state attorney general will pursue divestiture under an antitrust theory that is consistent with that of the federal government. As this case demonstrates, a defendant, such as American, is thus subject to conflicting and irreconcilable remedial demands.

The systemwide and extreme nature of the divestiture remedy, *see du Pont*, *supra*, 366 U.S., at 326, and the needed sensitivity to the underlying purposes and goals of the federal antitrust laws, suggest therefore that Congress would not have intended to place such a powerful weapon in the hands of private attorneys general. In all events, however, Congress cannot have intended to allow private parties to achieve structural relief in situations, such as this, in which federal enforcement authorities *have* in fact ex-

ecuted their public office by reviewing challenged conduct and imposing a structural remedy in accordance with federal antitrust policy. Any such private remedy would serve to undermine, rather than promote, federal enforcement goals.

2. The Private Divestiture Remedy Will Produce Anticompetitive Results by Encouraging Inefficient Competitors and Entrenched Takeover Targets to Thwart Legitimate Economic Activity

The acceptance by this Court of California's argument also will encourage private litigation designed to harass competitors or thwart takeovers. As the Department of Justice itself has recognized, "[t]he antitrust laws would be perverted if they could be used to thwart transactions that would enhance competition; a suit for injunctive relief, as well as a suit for damages, must 'serve ... the high purpose of enforcing antitrust law.'" Amicus Curiae Brief on Petition for Certiorari of the United States, at 8, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969)).[15]

[15] "Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors ... intimida[ting a potential defendant] into the sort of gentlemanly competitive behavior that is the antithesis of true competition." Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985). *Accord* Miller, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985). Professors Baumol and Ordover further explain that the economic benefits of such "protectionist" litigation are not dissipated by litigation expense; consequently, costs are not a disincentive to the bringing of such harassment suits. Baumol & Ordover, *supra*, at 250.

Indeed, the case books demonstrate that competitors or takeover targets have pursued divestiture actions in spite of the fact that this Court has never recognized such a private remedy and in spite of the costs attendant to bringing such actions.[16] There is, therefore, no reason to assume that wasteful protectionist attacks on pro-competitive economic activities will not thrive in an environment where private di-

[16] *See, e.g., Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987) (district court allows divestiture relief requested by competitors of merging companies); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd on other grounds*, 259 F.2d 524 (2d Cir. 1958) (takeover target secures indirect divestiture under Section 16 of the Clayton Act by convincing the court to enjoin permanently the acquiring company from voting any shares, acquiring representation on the board of directors, or acquiring any additional stock of the target); *Schrader v. National Screen Serv. Corp.*, 1955 Trade Cas. (CCH) ¶ 68,217 (E.D. Pa. 1955), *rev'd on other grounds*, 238 F.2d 59 (3d Cir. 1956), *vacated on other grounds*, 352 U.S. 992 (1957) (request by competitor for decree that would, in effect, put defendant out of business); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 107 F. Supp. 532 (S.D.N.Y 1952), *rev'd on other grounds*, 202 F.2d 731 (2d Cir. 1953) (original owners of 50% of stock of target corporation demand that acquirer of other 50% of stock be required to divest that stock to the corporation). *Cf. NBO Industries Treadway Companies, Inc. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977), in which the plaintiff challenged the acquisition by Brunswick of six failing bowling centers that were in direct competition with plaintiff. Although finding a Section 7 violation, the court rejected plaintiff's request for divestiture, concluding that such an order would *reduce* competition by putting plaintiff's competitors out of business. If divestiture was permitted in such a case, the court concluded, "what is intended as a shield for small competitors becomes a sword against the consumer." 523 F.2d, at 279.

vestiture is permitted. It was certainly not the goal of Congress in enacting the antitrust laws that interstate trade and commerce should be "needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." *Union Pacific Railroad Company v. Frank*, 226 F. 906, 909 (8th Cir. 1915) (quoting *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 71 (1904)). Yet this would be the consequence of private suits for divestiture under the Clayton Act.[17]

"In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy." *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 621 (1966) (Fortas, J., dissenting). *See also* U.S. Dept. of Justice, Merger Guidelines §§ 1, 3.5 (June 14, 1984). Opening the doors of divestiture to private antitrust plaintiffs invites indiscriminate challenges to pro-competitive economic activity. Such challenges have been and, if California prevails, will continue to be motivated not by a broad commitment to the public good but rather by commercial self-interest. This is not a public interest that Congress sought to promote in enacting the antitrust laws.

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[17] The danger that misuse of the remedy of divestiture might result in anticompetitive forfeitures strongly suggests that Congress would not have intended to place so powerful a weapon in the hands of self-interested private prosecutors. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (private plaintiffs may not be appointed to prosecute criminal contempt actions against their adversaries because of conflict of interest; "public interest" can only be vindicated by a neutral prosecutor who will not be influenced by improper motives).

CONCLUSION

In creating both public and private remedies for violations of the federal antitrust laws, Congress sought to develop a scheme of complementary enforcement. Although Congress placed principal enforcement authority in the hands of the Department of Justice and the Federal Trade Commission, it also developed a system whereby "private attorneys general" could augment federal enforcement efforts by pursuing certain private antitrust remedies in appropriate circumstances. California's position in this case perverts Congress's enforcement scheme by authorizing private parties to override federal antitrust enforcement decisions and thereby subvert the goals of the federal antitrust laws. For these reasons, the judgment of the court of appeals should be affirmed.

December 1, 1989

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No. 89-258

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. The Roundtable was founded in 1972 in the belief that business executives should take an increased and open role in continuing debates about public policy. The interest of The Business Roundtable includes the way in which the antitrust laws are shaped, interpreted, and enforced.[1]

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[1] Pursuant to Rule 36.2 of the Rules of the United States Supreme Court, this brief is filed with the consent of both petitioner and

The member companies of the The Business Roundtable are substantial enterprises, but they are nonetheless subject to ever increasing competitive pressure from other substantial enterprises throughout the world. The Roundtable members recognize that under established law the federal government can seek divestiture if a merger or acquisition subsequently threatens competitive harm. They are, however, seriously concerned about an expansive interpretation of the antitrust law that would give 50 states and any private party the right to seek the breakup of existing enterprises.

The parties have necessarily focused their arguments on the facts of this case and have not stressed the impact a decision will have on the business community as a whole. The precedent established here is vitally important to the business community. If this Court permits private parties to secure divestiture, despite the fact that the federal antitrust enforcement agencies have approved a transaction, the parties to a merger will face a high level of uncertainty. The mere pendency of a state investigation or the knowledge that a competitor wants to prevent an efficiency-enhancing transaction may effectively kill a merger because the parties cannot be sure that a closing is final. The combined organization could be deterred from integrating its operations to maximize efficiencies and to eliminate redundant facilities if it is threatened with divestiture actions by private parties. The Business Roundtable submits this brief in order to emphasize the practical and policy implications involved in this case and to underscore the need to affirm the decision below.

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respondents. Copies of letters of consent from the parties are being filed herewith.

SUMMARY OF ARGUMENT

This brief will not address the facts of this particular case, but will rather focus on the broad question whether the states and private parties have the same right to obtain divestiture relief as does the federal government. Without repeating the exhaustive discussion contained in respondents' brief, this amicus brief will show that there is a clear distinction in the Clayton Act between the injunctive remedies available to the federal government and private parties. This distinction was noted when the antitrust laws were amended as recently as 1976, and Congress did not eliminate it. Moreover, the policy justifications for the distinction are more compelling today than they were when the Clayton Act was enacted.

ARGUMENT

I. SECTION 16 AND ITS LEGISLATIVE HISTORY ESTABLISH THAT PRIVATE PARTIES MAY NOT OBTAIN DIVESTITURE.

Petitioners here claim that private parties should have the same right that the federal government has to obtain divestiture relief in merger cases. The short answer is that Congress obviously intended to differentiate between the remedies available to the federal government and those available to private parties because it used different words to describe those remedies.

Federal injunctive relief is authorized by Section 15 of the Clayton Act, 15 U.S.C. § 25, which refers to "proceedings in equity to prevent and restrain" violations. Private injunctive relief is authorized by Section 16 of the Clayton Act, 15 U.S.C. § 26, which refers to "injunctive relief * * * against threatened loss or damage" or "against threatened conduct that will cause loss or damage" under standards applied "by courts of equity." Petitioner's brief refers repeatedly to Section 16 as if it had been enacted in isolation; Section 15 is mentioned

only once in passing. (Petitioner's Brief at 39). But Sections 15 and 16 were passed at the same time, and Congress was aware of the scope of the federal government's remedy when it passed Section 16. Congress must have had *some* reason for using different language to describe the private injunctive remedy.

Familiar principles of statutory construction provide that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). *Accord, e.g., Water Quality Ass'n Employees' Benefit Corp. v. United States*, 795 F.2d 1303, 1307-8 (7th Cir. 1986); *Richerson v. Jones*, 551 F.2d 918, 928 (3rd Cir. 1977) (" 'where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed' ") (*quoting General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). Petitioner's brief does not provide any explanation whatever for the differences in the words used to describe federal remedies in Section 15 and private remedies in Section 16.[2]

The legislative history of the Section 16 private injunctive remedy has been reviewed in two leading cases that reached opposite results. *Compare IT&T Corp. v. GTE Corp.*, 518 F.2d 913, 920-24 (9th Cir. 1975) (divestiture

[2] Petitioner's brief also does not provide any explanation for the references to prospective conduct in Section 16 that are not paralleled in Section 15. As respondents' brief shows in detail, the language of Section 16 itself speaks in prospective terms. It uses such phrases as *"threatened* loss or damage" and *"threatened* conduct that *will* cause loss or damage" (emphasis added). These are the phrases one would expect to find in a statute authorizing a prohibitory injunction to prevent possible future unlawful conduct, but not the language one would expect in a statute authorizing divestiture to cure a past violation.

not available to private parties) *with CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 413-29 (1st Cir. 1985) (divestiture available to private parties). Considerable additional detail has been supplied in respondents' brief. This brief will not burden the Court with a recapitulation of the history set forth in these sources, but two points should be emphasized.

First, both opinions recognize that there is support in the legislative history for the conclusion that Congress intended to make divestiture available to the federal government and unavailable to private parties. The *CIA. Petrolera* opinion argues that this support is not compelling, 754 F.2d at 427, but respondents have demonstrated that the legislative history is more persuasive than the First Circuit opinion recognizes. It is also significant, however, that the *CIA. Petrolera* court, like petitioner, provides no alternative explanation whatever to account for the fact that Congress chose to use different words to describe federal and private remedies.

Second, the court in *CIA. Petrolera* candidly admitted that it would be inclined to ignore contemporary Congressional intent, even if that intent had been entirely clear:

> We do not believe that a court can ignore the contemporary legal meaning and scope of words employed in statutes and base its interpretation of the plain language solely on what it surmises was the meaning of the words at the time of original enactment. [754 F.2d at 418]

Later, the First Circuit stated that courts should not be confined by "the pronouncements of statesmen long deceased." 754 F.2d at 427, *quoting NBO Indus. Treadways Co. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3rd Cir. 1975), *rev'd on other grounds*, 429 U.S. 477 (1977).

The *CIA. Petrolera* court justified its cavalier attitude toward the interpretation of statutes principally by refer-

ence to quotations about flexible interpretation of the Constitution. 754 F.2d at 418. It may be appropriate to interpret the Constitution to apply to situations not specifically contemplated by the nation's founders, but the First Circuit's analogy to Constitutional interpretation is inapt here. As the language and legislative history of Section 16 plainly shows, Congress contemplated a distinction between private and federal remedies. That intention should not be disregarded. As discussed below, this is particularly true when "statesmen" who are not "long deceased" have recognized the distinction and preserved it.

II. RECENT MERGER LAW AMENDMENTS DEMONSTRATE CONGRESS' CONTINUING INTENTION THAT STATES MAY NOT OBTAIN DIVESTITURE.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Hart-Scott-Rodino Act") amended the Clayton Act to provide that significant mergers had to be notified in advance to both the Department of Justice and the Federal Trade Commission. Clayton Act § 7A, 15 U.S.C. § 18a. The purpose and effect of premerger notification is to prevent substantial corporations from consummating significant mergers in secret, and to give the federal antitrust enforcement agencies a chance to examine the competitive effects of proposed mergers in advance. The Senate Judiciary Committee agreed with the Justice Department's view that "[premerger] notification would provide us with time to develop the information needed to insure a thorough evaluation of whether the proposed merger should be challenged. • • • [It] will prevent the consummation of so-called 'midnight' mergers designed to subvert the Department's authority to seek preliminary relief." S. Rep. No. 803, 94th Cong., 2d Sess., pt. 1 at 64-65 (1976) (hereinafter cited as "S. Rep. No. 803"). The Hart-Scott-Rodino Act provides an alternative way for private parties to be heard on merger effects, and by facilitating advance scrutiny of mergers

it lessens the importance of the divestiture remedy. H.R. Rep. No. 1373, 94th Cong., 2d Sess. 7-11 (1976) (hereinafter cited as "H.R. Rep. No. 1373").

Separate provisions of the Hart-Scott-Rodino Act also authorized states to bring *parens patriae* antitrust actions for injuries suffered by their citizens. 15 U.S.C. §§ 15c-15h.[3] When the Hart-Scott-Rodino Act was passed, Congress considered authorizing states to seek divestiture. Indeed, the Senate version of the legislation contained language "intended to insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment, which may be appropriate remedies under certain circumstances, whether or not it fits within the traditional concept of 'equitable relief' or 'injunctive relief'." S. Rep. No. 803 at 45. However, the Conference Committee expressly chose *not* to authorize such mandatory equitable relief. Congressman Rodino, the Chairman of the House Judiciary Committee and sponsor of the legislation, explained why mandatory remedies were not provided:

> The compromise bill authorizes only monetary relief. That is because restitution seems unnecessary in light of the broad authority for damage recoveries conferred by the compromise bill. As for injunctive relief, the compromise bill omits any reference to it solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under the Clayton Act, 15 United States Code, section 26. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. *Provision for equitable relief; that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits*

[3] Petitioner here purports to sue as *parens patriae*. Pet. App. A-6. Thus, it is particularly relevant whether the legislation authorizing *parens patriae* litigation permits the states to obtain divestiture.

seeking divestiture. [122 Cong. Rec. 30,868 (1976) (emphasis added)].

This authoritative statement by Congressman Rodino is significant.[4] Rejection of a divestiture remedy for the states by a Congressional Conference Committee is not the same thing as rejection by a floor vote, but it demonstrates that as recently as 1976 authoritative Congressional spokesmen recognized the difference between private remedies and federal government remedies, and Congress chose to preserve the difference.[5]

This Court has repeatedly looked to positions Congress previously considered and rejected in determining the appropriate meaning of a statute. Here, in 1976 Congress considered giving the states authority to seek divestiture and specifically rejected such proposed legislation. Congressional rejection of proposed legislation is compelling evidence that Congress did not intend to adopt that particular view. *See, e.g., Philbrook v. Glodgett*, 421 U.S. 707, 718-19 (1975) (Congress' repeated rejection of Senate attempts to restore to states discretion in coverage

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[4] Since there was no Conference Committee Report on the Hart-Scott-Rodino Act, Congressman Rodino's statement is authoritative. *See Lieberman v. FTC*, 771 F.2d 32, 39 (2d Cir. 1985). Moreover, Congressman Rodino's interpretation of the Hart-Scott-Rodino Act is particularly instructive: "[a]s a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

[5] As this Court unanimously held in *Bell v. New Jersey*, "the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." 461 U.S. 773, 784 (1983). *See also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure"); *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969) (subsequent congressional statements are entitled to careful consideration "as a secondarily authoritative expression of expert opinion").

of program is compelling evidence of Congressional intent to make coverage requirements mandatory and uniform); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975) (Congress' failure to adopt proposed limitation on securities laws that would have reversed judicial interpretation is significant evidence of Congressional intent to accept interpretation); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966) ("The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching").

Congress' decision to restrict private remedies in 1914 is not just an archaic notion that has been outmoded by time. It is rather a choice that was reaffirmed in modern times, and one that is actually even more compelling today.

III. POLICY CONSIDERATIONS REQUIRE THAT STATES AND PRIVATE PARTIES BE DENIED DIVESTITURE RELIEF.

Private and state enforcement of the antitrust laws are important supplements to federal enforcement in many areas. If, for example, private parties or state attorneys general prosecute price-fixing conspiracies among competitors, there is a positive public benefit and virtually no potential for conflict with national competitive policies. The applicable legal principles are relatively clear, and have been settled for a long time. In some areas, however, the risk of conflict between private and local objectives and federal objectives is serious. The merger law is one such area.

It is universally recognized that mergers can achieve important efficiencies and benefit the public. For example, the Department of Justice Merger Guidelines state:

> Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. * * * The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. [U.S. Dept. of Justice, Merger Guidelines §§ 1, 3.5 (June 14, 1984)].

The appropriate policy toward mergers is a subject of national concern and debate. The Court may take notice of the fact that the commercial world is shrinking and that U.S. industries face increasingly vigorous competition from overseas competitors. Nations who are major trading rivals of the United States have, or are moving toward, a broad coordination of competitive policies.[6] Fragmented or balkanized merger-law policies will impose a real burden on interstate commerce and impair the overall competitiveness of U.S. industry.

It is not safe simply to assume that private parties or even state attorneys general are guided by the same national concerns when reviewing mergers. Competitors, for example, may have a strong incentive to thwart efficiency-creating mergers precisely because they create efficiencies and therefore portend a more vigorous competitive environment. That is why this Court held that it is important to apply standing rules to screen out competitor suits that seek to apply the merger law in anticompetitive ways. *See Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104 (1986) (denying standing to a competitor who failed to assert or prove antitrust injury).

[6] Presently, the European Community Commission is working on unified merger guidelines in anticipation of the unification of the European Economic Community in 1992. *See* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1414, at 688-89 (May 4, 1989). The Administration has been examining the probable consequences flowing from the European community's program to develop a single internal market by 1992. The Administration's newly-formed Council on Competitiveness has announced that one of its primary goals will be to "strengthen U.S. competitiveness in world markets, with specific emphasis on ways to ensure that U.S. regulatory policy does not hinder the ability of U.S. firms to compete with EC rivals." *See* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1421, at 896-97 (June 22, 1989).

Policy conflicts are also present when states enforce the merger laws. States may use the antitrust laws to prevent mergers that threaten no competitive harm, but may cause local economic dislocation. Efficiencies that benefit consumers may be created, for example, if different manufacturing operations or headquarters staffs are consolidated in one location. This consolidation will obviously have adverse employment effects in one state or another, which may have a strong motivation to block an efficiency-enhancing merger for these reasons.[7]

The problems created by conflicting state and federal merger policies have been recognized in recent decisions. Both *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985), and

[7] For example, North Carolina and South Carolina entered into an agreement with West Point-Pepperell, Inc. in connection with its acquisition of J.P. Stevens & Co. that contained the following provisions:

> 1. [West Point] will make every effort to continue to operate a Greenville management center, will work toward keeping a substantial presence there, and will maintain as many employees as are consistent with the efficient operation of its business; 2. West Point will provide preferential consideration to former Stevens managerial personnel for any opening for which they are qualified; 3. For two years, West Point agrees not to close any plants and to make all reasonable, good faith, efforts not to reduce current employment levels; 4. Community services by management and employees will be actively promoted; 5. West Point will continue use of and maintain present contracts with local vendors provided price and quality are competitive.

Letter dated May 4, 1988, from West Point-Pepperell, Inc. to Governor Carroll Campbell, Hon. T. Travis Medlock, and Hon. Lacy B. Thornburg.

Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985), held that states were not authorized to obtain premerger materials filed with the federal government under the Hart-Scott-Rodino Act. The immediate issue was different, but the policy rationale is instructive. Both courts recognized that an overriding concern for a uniform national policy concerning large mergers was a basis for denying access to premerger filings by state attorneys general. In *Mattox*, the Fifth Circuit stated:

> Because [the Hart-Scott-Rodino Act] only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality. [752 F.2d at 122].

The Second Circuit addressed the same policy issues in *Lieberman*:

> [G]iving state authorities the premerger information and the chance to bring suit more easily might well mean big delays in the fast world of mergers—delays Congress has not countenanced. We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to [FTC] or Justice Department decisions whether to block large-scale mergers of national or international significance. [771 F.2d at 40].

We do not suggest, of course, that the states or private parties are disabled from enforcement of the federal merger law. They are entitled to the remedies that Congress has provided. But in light of the potential conflicts in enforcement philosophy, there is no policy reason to expand available remedies by interpreting Section 16 to permit relief that Congress did not intend to provide.

The Congressional choice was not arbitrary; there is a principled distinction between prohibitory injunctive relief and divestiture. Prohibitory injunctions are serious

and even a temporary delay can effectively kill a merger. But interruption of future plans is still far less serious than disruption of an existing integrated enterprise. There is no statute of limitations on enforcement of the merger law; federal authorities can obtain divestiture many years after the original combination. *United States v. E.I. duPont de Nemours*, 366 U.S. 316, 326-29 (1961). If petitioners were to prevail here, private parties enforcing the antitrust laws for private gain might be able to obtain divestiture many years after a merger is consummated. It was entirely rational for Congress to provide that divestiture, which can cause such massive disruption, is a remedy that should be reserved to the federal government.

There is, in fact, far less need for private divestiture relief today than there was in 1914. As explained above, under the Hart-Scott-Rodino Act, the Federal Trade Commission and the Department of Justice now have the opportunity to review significant mergers in advance. In the course of this review, these antitrust agencies can and do solicit the views of private parties and other governmental entities. Moreover, private parties and state attorneys general also can bring actions to enjoin a merger and they often exercise that right.

But the Hart-Scott-Rodino Act is a balanced statutory scheme that recognizes the importance of time, and imposes limitations on the period of review. Once that period has expired without federal interference, the parties are free to proceed with the merger. 15 U.S.C. § 18a (b) (1) & (e) (1); H.R. Rep. No. 1373 at 11. Although there is no assurance in the law against future federal action 15 U.S.C. § 18a(i), up to now there have been no federal challenges to mergers that have been cleared through the process. As a practical matter, the law provides a high level of comfort to the business community.

Indeed, this kind of assurance was cited by Congress as a significant advantage of the premerger notification

process. As the Senate Judiciary Committee stated, "[p]remerger notification will also advance the legitimate interests of the business community in planning and predictability. It will enable firms to make post-acquisition changes with much more confidence than they can at present." S. Rep. No. 803 at 65 (quoting with approval testimony by Assistant Attorney General Kauper). The House Judiciary Committee recognized that premerger notification "will advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373 at 11. Congress also recognized that premerger review would ease burdens on the courts "by forestalling interminable post-consummation divestiture trials." *Id.*

These significant advantages will be undercut if private parties or states have the power to undo mergers that have already been approved by federal authorities.[8] Federal merger policy should not be undone by private actions for divestiture after closing. It is true that federal enforcement of the merger law has been controversial in some respects, but if substantial numbers of people are dissatisfied with these federal policies, they are subject to change through the political process. This Court should not encourage local and private assaults on federal policies by the expansion of statutory remedies beyond those clearly intended.

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[8] In this case, of course, the Federal Trade Commission imposed a remedial order, after a period of public comment. California, which participated in the comment process, now wants a second chance to have its way. If California can do it in this case, there is nothing to prevent any other state or private party from doing so in the future.

CONCLUSION

In 1914, Congress obviously chose to make a distinction between the equitable remedies available to the federal government and those available to private parties or the states. Congress re-affirmed that distinction in 1976 when it enacted the *parens patriae* legislation in the Hart-Scott-Rodino Act. The reasons for the distinction are even more compelling today.

Because the federal government has advance notice of significant mergers, parties have an opportunity to react in advance and the divestiture remedy is not as important as it once was. At the same time, because of the pressure of international competition, the rationale for a special federal role in the merger area is more compelling today than ever. Extension of merger remedies beyond those clearly granted by statute would be a step in the wrong direction. This Court should affirm the opinion of the Ninth Circuit.

Respectfully submitted,

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No. 89-258

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Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,
v.
AMERICAN STORES CO.,
ALPHA BETA ACQUISITION CORP.,
and LUCKY STORES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS AFFILIATED LOCAL UNIONS 324 AND 770 AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

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OCTOBER TERM, 1989

No. 89-258

STATE OF CALIFORNIA,
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AMERICAN STORES CO.,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS AFFILIATED LOCAL UNIONS 324 AND 770 AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

With written consent of petitioner and respondents, filed concurrently herewith, the United Food and Commercial Workers International Union (UFCW), UFCW Local Union 324 (Local 324), and UFCW Local 770 (Local 770), as *amici curiae*, present this brief in support of respondents' position that the decision of the Court of Appeals for the Ninth Circuit, overturning the preliminary injunction ordered by the District Court for the Central District of California, should be affirmed.

INTEREST OF AMICI CURIAE

The UFCW is an international labor union, affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Canadian Labour Congress (CLC), having a total membership of over one million wage-earners throughout the United States and Canada. It and its chartered local unions represent, as exclusive representatives for purposes of collective bargaining within the meaning of Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a), employees of supermarket chain stores, independent retail grocery stores, and other retail food outlets throughout the United States.

UFCW Locals 770 of Los Angeles and 324 of Buena Park are the two largest UFCW local unions in California. Together with their other sister locals in the state, they represent nearly all of the employees of the major supermarket chains directly or indirectly interested in the outcome of this case, including Vons Grocery Company, Safeway Stores, Lucky Stores and Alpha Beta, among others. The unions submit this *amicus curiae* brief to bring to the Court's attention the severe adverse effect of the district court's preliminary injunction on the more than 30,000 employees of Alpha Beta and Lucky Stores in southern California.

Corporate mergers and acquisitions in any American industry often create serious challenges to employees' collectively-bargained rights. In recent years workers in the retail food industry have borne their share of the impact of such mergers. They thus have become deeply and justifiably concerned about securing protection against such adverse economic consequences as: (1) impairment of job security resulting from reductions in the labor force of the newly-combined enterprise; (2) loss of established company, departmental and/or classification seniority rights acquired through years of service; (3) withdrawal of continuous-service participation and benefits accrual in employee pension plans or group health-care plans; (4) interruptions of periods of unbroken service which can jeopardize paid-vacation rights; (5) reduction in guaranteed hours of employment and reductions from full-time to part-time status; (6) new apprenticeship or probationary periods imposed by the successor employer; (7) displacement from continued work opportunities in higher-paid job classifications or preferred departments; (8) reduction of opportunities for future job promotion; and (9) arbitrary operational transfers from workplace to workplace.

While these effects can be felt in any major corporate restructuring, they can be badly exacerbated where, as here, the merger is completed and approved by the federal government (subject to some divestiture), the unions rely on that resolution and attempt to protect their members' jobs and benefits through collective bargaining, and *then* a state attorney general challenges the merger anew, threatening an additional divestiture order.

The effect upon employees can be seen by comparing the two major mergers recently experienced in the southern California retail food industry. As alleged in the complaint, on or about December 3, 1987, Vons Grocery Company, operating approximately 183 supermarkets in California, entered into an agreement for purchase of the southern California division of another chain, Safeway Stores, Inc., consisting of 172 supermarkets. The merger was consummated in late August, 1988 and received final approval by the Federal Trade Commission (FTC) on August 31, 1988, the very same day the FTC gave final approval to the Lucky/Alpha Beta merger at issue here.[1] The California Attorney General did not challenge the FTC approval of the Vons/Safeway merger

[1] 697 F.Supp. 1125, 1127.

either before or after consummation. The UFCW local unions were thus free to collectively bargain an agreement with Vons protecting the economic rights and interests of the employees of the newly-acquired Safeway supermarkets.

So too, in Nevada, Alpha Beta and Lucky operations were allowed to merge pursuant to the same FTC order of August 31, 1988. Neither the Nevada Attorney General nor any other Nevada party challenged the merger either before or after consummation, and the UFCW unions were able successfully to reach an agreement on the effects of the merger, including terms governing seniority, scope of the bargaining unit, successorship and the like.

The Lucky/Alpha Beta merger in California stands in sharp contrast to these definitive resolutions. Despite being given notice and the same merger information supplied to the FTC, the petitioner waited until *after* consummation of the merger and *after* a tentative FTC consent order was approved to challenge the merger. See respondents' Brief, Statement of the Case. In substance, on September 1, 1988 the California Attorney General filed a lawsuit seeking to "undo" what he had knowingly but silently watched become "done" in a final consent order by the federal government. As the court of appeals observed: "California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed [but] . . . chose not to do so." 872 F.2d at 846.

By consciously delaying the commencement of this action for several months, the petitioner improperly interfered with and disrupted the unions' efforts to protect the rights and interests of the Lucky/Alpha Beta employees through collective bargaining. Commencing in July, 1988 the UFCW local unions, including Locals 324 and 770, met on at least ten occasions with Lucky/Alpha Beta representatives in an attempt to reach an understanding on the effects of the merger and to provide for

continued job security of employees. Agreement was reached on a "dovetailed" seniority list, the probationary period for the employees of the merged entity, and a procedure for crediting employees' earned vacation time with the predecessor employers. All of these commitments, however, had to be conditioned upon the final disposition of the instant litigation, and other equally pressing issues could not be even tentatively resolved.

Thus, the preliminary injunction which issued on September 29, 1988, requiring American Stores to hold its Alpha Beta and Lucky operations separate in California and prohibiting it from taking any further steps to integrate these operations, placed a dark cloud of uncertainty and instability over the economic future of tens of thousands of supermarket employees. Quite apart from the devastating impact on employee morale and collective bargaining, the "indirect divestiture" order has made it extremely difficult for the local unions to refer to American Stores unemployed, competent and experienced retail clerks and meat cutters within their memberships.[2]

In sum, the "indirect divestiture" decree forbidding integration of two supermarket operations owned by a common owner, and the looming possibility of a final judgment requiring divestiture or dissolution, has left over 30,000 Lucky/Alpha Beta employees in an economic limbo. As the statutory bargaining representatives

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[2] The adverse impact of the preliminary injunction upon northern California employees was recently eliminated when the district court approved a stipulation for modification of the preliminary injunction on November 7, 1989. This modification permits the collective-bargaining parties to implement any agreement reached between them providing a stable work environment for employees of the 23 remaining Alpha Beta stores in northern California. These Alpha Beta stores have been allowed to be integrated into Lucky Stores operations. Of course, this stipulation neither affects the 257 Lucky and Alpha Beta stores in southern California nor the legal issues presented to this Court.

of these employees, the unions have been prevented from concluding and implementing an agreement to protect their rights and interests. For these reasons, UFCW and its Local Unions 324 and 770 ask to be heard as *amici curiae* in this case.

SUMMARY OF ARGUMENT

The union *amici curiae* address here only the narrow issue of whether a state attorney general can sue to obtain the remedy of divestiture under § 16 of the Clayton Act where: (1) the notice and waiting procedures of the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) have been followed; (2) the federal government has issued a final consent order approving the merger; (3) the state attorney general has declined to file a pre-merger lawsuit; and (4) the unions who represent the employees of the merging companies have relied on the federal resolution and have obtained some protection from the consequences of the merger for those employees through collective bargaining.

Allowing a private divestiture remedy in these circumstances would fatally undermine the very purpose and goal of the HSR Act, which is to resolve antitrust challenges *before* the consummation of the merger in order to *avoid* the need for the drastic and disruptive remedy of divestiture. Employees, such as those represented by UFCW here, are entitled to enjoy the finality and certainty which Congress intended for all members of the business community under the HSR Act, and should not be subject to the unnecessary economic uncertainty and instability which a divestiture order would bring in a case like this.

Moreover, allowing a state attorney general to sue for divestiture under these circumstances would conflict with the stated goal of the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) to promote industrial peace through

free collective bargaining. The threat of a private divestiture remedy issuing after the federal government has finalized a consent order, upon which the employees' unions have justifiably relied, makes it impossible for unions to effectively fulfill their statutory duty to represent employees in collective bargaining and to protect them, as best they can, from the adverse employment consequences of corporate mergers.

ARGUMENT

I. CONGRESS DID NOT INTEND TO ALLOW STATE ATTORNEYS GENERAL TO SUE FOR DIVESTITURE WHERE THE PRE-MERGER NOTICE PROCEDURES OF THE HART-SCOTT-RODINO ACT HAVE BEEN FOLLOWED AND A FEDERAL CONSENT ORDER HAS BEEN EXECUTED

This Court has recognized that a judicial order of divestiture of corporate stock or assets is a remedy "extreme even in its mildest demands," *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 46 (1918), requiring a "surgicial ruthlessness" to undo an already-consummated economic transaction upon which many persons may have relied as final. *See United States v. E.I. Du Pont de Nemours and Co.*, 366 U.S. 316, 363-64 (1961) (Frankfurter J., dissenting), *quoting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 348 (D.Mass. 1953), *aff'd*, 347 U.S. 521 (1954). The forced sale of the stock or assets of any corporation necessarily has an "inevitable impact far beyond the interests of the immediate parties." 366 U.S. at 358. Indeed, for the employees represented by the union *amici* here, the prospect of corporate divestiture threatens their very livelihood.

While petitioner California and respondent American Stores argue the point whether divestiture is *ever* an available private remedy under Section 16 of the Clayton

Act, the union *amici* emphasize here a narrower point specific to this case: that Congress certainly could not have intended that such a drastic and disruptive remedy be available to private parties where (1) the notice and waiting procedures of the Hart-Scott-Rodino Antitrust Improvements Act have been followed, (2) the federal government as the protector of the national public interest has executed a final consent order after fair notice to and comment by the general public, and (3) the state attorney general has been given an opportunity to commence a less disruptive pre-merger lawsuit for preventive relief but has declined. In these circumstances, allowing a state attorney general, or any other private party, to seek to "undo" a merger after it has been formally approved by the federal government and consequently consummated would negate the very purpose of the HSR Act and subject employees, such as those represented by UFCW, to a prolonged period of uncertainty and adjustment.

The HSR Act creates a comprehensive notification procedure and waiting period to allow for federal administrative review of contemplated corporate mergers and acquisitions *before* they are consummated.[3] The express

[3] Section 7A of the Clayton Act, as amended by the HSR Act, provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired . . . ." 15 U.S.C. § 18a(a). Subsection (d)(1) requires that corporations involved in contemplated mergers provide notice to the Federal Trade Commission and the Assistant General along with such documentation "as is necessary and appropriate to enable [them] to determine whether such acquisition may, if consummated, violate the antitrust laws. . . ." Subsection (b)(1) provides for a 30-day waiting period commencing on the date of receipt of the completed notification and ending on the 30th day thereafter, subject to an extension of 20 additional days. 15 U.S.C. § 18a(b)(1), (e)(2).

purpose of these amendments is to "advance the legitimate interest of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 2637, 2643. The goal is to avoid the disruptive and often futile task of "unscrambling the egg" in the form of a post-consummation divestiture order. *See* 10 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* at 7 (1985).

Indeed, in passing the HSR Act, Congress specifically considered giving state attorneys general the right to sue for divestiture, but rejected the proposal as inconsistent with the Act's overall enforcement scheme. While the law ultimately enacted allows state attorneys general, acting in their *parens patriae* capacity, the right to obtain treble *monetary* damages on behalf of their constituents, the original Senate bill had proposed granting the state law enforcement officials broader authority to seek both "monetary *and other* relief." S. Rep. No. 1284, 94th Cong., 1st Sess. 401 (1976) (emphasis added). The Senate Report on this provision stated:

> Present section 16 of the Clayton Act allows private suitors "injunctive relief against threatened conduct that will cause loss or damage" by a violation of the antitrust laws (15 U.S.C. § 26). [The Senate bill] is intended to *insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment*, which may be appropriate remedies under certain circumstances, *whether or not it fits within the traditional concept of "equitable relief" or "injunctive relief."*

S. Rep. No. 803, 94th Cong., 2d Sess. 45 (1976) (emphasis added). The House version of the bill, on the other hand, provided only for damages.

Faced with this direct conflict between the House and Senate bills, the conference committee adopted the former. Representative Rodino explained:

> [T]he compromise bill omits any reference to [injunctive relief] solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under [section 16]. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. *Provision for* [*broader*] *equitable relief, that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10295-96 (daily ed. Sept. 16, 1976) (emphasis added).

Where Congress specifically voices its approval of an interpretation of statutory language in the course of reenacting and amending a statute, "Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 134 (1978). This conclusion is especially compelling where, as here, the two Houses of Congress propose competing bills on the issue and the entire Congress adopts one of them. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). *See also Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). *Compare Pierce v. Underwood*, —— U.S. ——, 108 S.Ct. 2541, 2550-51 (1988) (contrary result where, unlike here, "no indication whatever in the text or even the legislative history of the . . . reenactment that Congress thought it was doing anything insofar as the present issue is concerned. . . ."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971) (same, respondent "can point to no direct evidence that

Congress ever considered the issue" before the Court). It is thus very clear here that Congress specifically considered the issue and decided to *withhold* from state attorneys general the remedy of corporate divestiture.

Congress indeed *had* to reject the Senate bill if the HSR Act was to have its intended purpose and effect. The HSR amendments created a mechanism designed to avoid the necessity of the post-merger disruption and dislocation which can be caused by dissolution or divestiture. As in this case, the HSR Act requires that those contemplating a major corporate acquisition notify the federal government and provide such information as is necessary and appropriate to determine "whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1). This notice triggers, as it did here, an intensive investigation by the FTC, the federal agency charged with the responsibility for protecting the national public interest in interstate commerce, and a determination whether that public interest requires action. If the FTC or Assistant Attorney General concludes that enforcement action is required and administrative or judicial proceedings are commenced, the government may seek corporate divestiture. 15 U.S.C. §§ 21(b), 25.

If, however, the federal government determines that the merger does not violate the antitrust laws it must publish a notice to that effect in the Federal Register. 15 U.S.C. § 18a(b)(2). Alternatively, should it decide that certain concessions will eliminate a potential antitrust violation, it can negotiate a provisional consent order which also must be published in the Federal Register subject to public comment for a period of 60 days before becoming final. 16 C.F.R. §§ 2.31-2.34.

Were private parties, including state attorneys general, authorized to sue to divest corporate assets or to "undo" a consummated merger after the federal government has negotiated a settlement requiring some corporate divestiture, the whole point of the HSR amendments would be

lost. There would be no pre-merger resolution of antitrust issues and certainly no advancement of the "legitimate interest of the business community in planning and predictability." A divestiture challenge could come from one or more of the 50 state attorneys general, or indeed from any number of competing private businesses, seeking to unravel what the federal government as the primary enforcer of the antitrust laws has already declared meets its antitrust scrutiny. Parties to a corporate acquisition and, most important to these *amici curiae*, the employees of those corporations who are vitally affected by the decisions made in the corporate board rooms and who thus must be considered part of the "business community" with which Congress was concerned, could not rely on the federal government's negotiated order as final. As a result, the pre-merger investigation and resolution made possible by the HSR Act would be rendered effectively meaningless.

As this Court has recognized, "[t]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these." *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954), *quoting United States v. Bendix Home Appliances*, 10 F.R.D. 73, 77 (S.D.N.Y. 1949). "[I]t is the Attorney General and the United States District Attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws." *Borden*, at 518. Thus, a determination by the Federal Trade Commission and the United States Attorney General regarding whether and to what extent the public interest requires divestiture should be entitled to substantial deference.

Indeed, a report of the Attorney General's National Committee urges federal antitrust enforcement officials to consider the effect of the divestiture remedy "*on the public* as well as the defendant and persons interested in it,

[such] as investors, customers *and employees*. Such appraisal," the Committee emphasized, "seems a *primary responsibility* of any antitrust enforcement agency." *Report of the Attorney General's National Committee To Study The Antitrust Laws*, at 356 (March 31, 1955) (emphasis added). While private enforcement does serve an important role in the statutory antitrust scheme, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), private parties, including state attorneys general with more local concerns and constituencies at heart, should not be allowed to second-guess the federal government on the needs of the *national* public interest.

The goal, then, of "accomplishing [the remedial] result with as little injury as possible to the interest of the general public," *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911) is one which can best be effectively accomplished when the federal government is the plaintiff; and once the federal government has considered the public interest and then has *acted* by issuing, after public notice and comment, a formal consent order requiring some corporate divestiture, private parties should not be allowed to take a second shot at the corporate target. In short, since divestiture "is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the Government in their unlawful project," *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948), it makes no sense to make divestiture available to private litigants in their own private interest when defendants *cannot* "outdistance the Government" under the HSR Act.[4]

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[4] Section 7A(i)(1) of the HSR Act, entitled "Construction with other laws," provides:

> Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any

California *admits* in its Brief that a less-disruptive pre-merger lawsuit for a preliminary injunction was possible given the HSR notification and waiting procedures used in this case. Petitioner's Brief at 36.[5] It argues however, that the "expense of initiating suit before mergers are completed" and the "practical reality of meeting the burden of proof for a preliminary injunction in a Section 7 case" excuses its delay and militates against upholding the no-divestiture rule. *Id.* But the cost and difficulty of litigation are no reasons to undermine a Congressional scheme designed precisely to *forestall the need* for the extreme, disrupting remedy of post-merger dissolution or divestiture.[6]

If the California Attorney General prevails before this Court, the workers represented by the UFCW will have to pay the price of the state's strategy of "wait and see." Had California enjoined the merger before completion, Alpha Beta and Lucky would have remained viable, separate entities, and eventually the merger would or would

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action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

15 U.S.C. § 18a(i)(1). We do not suggest, of course, that the state attorney general is barred from commencing any "proceeding" or "action" (see note 6 *infra*), but only that the *remedy* he is entitled to under Section 16 should be consistent with the Congressional purpose expressed in the HSR Act.

[5] The California Attorney General received notice of American Stores' first tender offer at the same time the FTC did, on March 21, 1988. The merger was not consummated until June 9, 1988, and the Attorney General filed this lawsuit on September 1, 1988. See Respondents' Brief, Statement of the Case.

[6] Of course, nothing prevented the California Attorney General from seeking, at an early date, a preliminary injunction preserving the *status quo* pending completion of the FTC investigation. And even if the Attorney General is denied the right to request divestiture, he can still obtain prospective injunctive relief and treble damages on behalf of all consumers in the state who must pay higher food prices because of an antitrust violation. *See Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

not have been blocked. In the meantime the employees could have lived with the *status quo*. So too, had California accepted the FTC consent decree as a resolution of its antitrust concerns, the employees and their unions could have made their adjustments and agreements through collective bargaining with the merged employer.

But if California is allowed to ignore the federal consent decree and proceed to trial threatening divestiture or dissolution, the employees are faced with the worst of all possible worlds. After adapting both to the merger itself and the FTC divestiture order, they now will be faced with at least several years of uncertainty about the continued viability of their employer and the impact of any ultimate divestiture order on their jobs. This is not a result which Congress could have intended when it passed the HSR Act. As members of the "business community" and part of the "public interest," the employees represented by the UFCW, like other employees affected by corporate mergers, are entitled to share in the benefits of finality and certainty which Congress intended to provide under the Hart-Scott-Rodino Act.

II. PROVIDING A STATE ATTORNEY GENERAL WITH THE RIGHT TO SEEK DIVESTITURE IN THE CIRCUMSTANCES OF THIS CASE WOULD CONFLICT WITH CONGRESSIONAL LABOR POLICY

Allowing the California Attorney General to sue for divestiture in this case would not only undermine the Hart-Scott-Rodino Act; it would also collide with the Congressionally-created policy of resolving industrial disputes through peaceful collective bargaining. In this case the divestiture order sought by the Attorney General would, by threatening the efficacy and stability of collective bargaining, undermine the policies of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

As we described above, the UFCW unions relied on the federal government's final consent order and attempted to bargain with the newly-merged employer to protect the employees affected by that change in corporate identity. But because of the "hold separate" preliminary injunction and the threat of an eventual final divestiture order, the unions have been unable to accomplish any real stability or certainty. A court-ordered breakup or divestiture of American Stores at the end of this litigation would only aggravate the disruption to a once-stable collective bargaining relationship. More than that, this action has made any collective bargaining virtually impossible while the cloud of a possible divestiture order remains over the parties. As a result, the employees represented by the *amici curiae* have been denied the benefits which federal labor law is supposed to provide them: stable labor relations and protection from the worst effects of unchecked competition. In short, the California Attorney General's request for divestiture puts federal antitrust law in a head-on conflict with the goals of our national labor policy favoring collective bargaining as the means for resolving industrial disputes.

This is, of course, not the first time that the two statutory schemes have come into conflict. This Court has found it necessary on many occasions to resolve the tension between the antitrust policy of promoting free competition in the market for goods and services and the equally-weighty Congressional interest in allowing workers to protect themselves from the effects of such competition through collective bargaining. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 806 (1945). Nowhere is this clearer than in the cases defining labor's "nonstatutory" antitrust exemption in which this Court has endeavored to reconcile the two policies without doing violence to either. *See Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Allen Bradley, supra*. While reconciliation of the national antitrust and labor policies often is a difficult task of balancing interests and concerns to which Congress may have actually given no thought, *see, e.g., Federal Maritime Comm'n v. Pacific Maritime Assoc.*, 435 U.S. 40 (1978) and *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261 (1968), it is inescapable.

In striking this balance, this Court has accommodated not only the statutes' substantive provisions but the remedies available under them as well:

> In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization [and collective bargaining], not only by delineating exemptions from antitrust coverage but also *by adjusting the scope of the antitrust remedies themselves. See, Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

Connell Construction Co., supra, 421 U.S. at 636 (emphasis added). Certain remedies are simply too inherently dangerous to the national policy of fostering stable collective bargaining relations to be permitted.

In a case such as this, a divestiture remedy in the hands of a well-meaning state attorney general may not only burden but block collective bargaining. Our national labor policy therefore requires that the California Attorney General be denied the right to seek divestiture in the particular circumstances of this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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